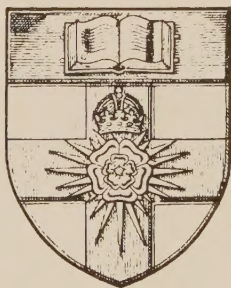


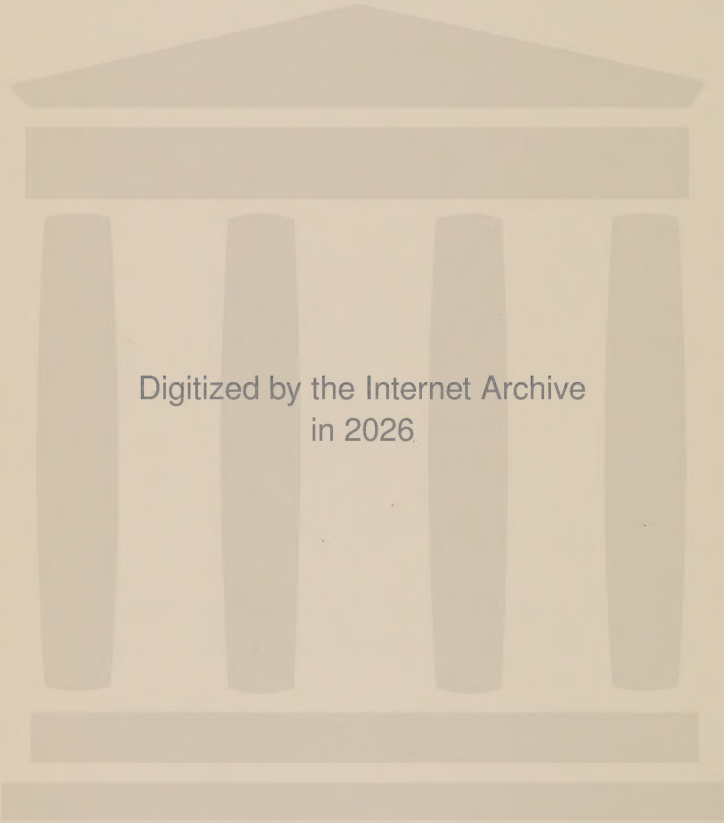
UNIVERSITY OF TORONTO LIBRARY

**THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY**

346.4 Mx North



UNIVERSITY OF LONDON
LIBRARY



Digitized by the Internet Archive
in 2026

THE
INCORPORATED COUNCIL OF LAW REPORTING
FOR
ENGLAND AND WALES.

Members of the Council.

Chairman—H. F. DICKENS, Esq., K.C.

Vice-Chairman—T. R. HUGHES, Esq., K.C.

EX-OFFICIO MEMBERS.

RIGHT HON. SIR GORDON HEWART, M.P. . . ATTORNEY-GENERAL

SIR E. M. POLLOCK, M.P. SOLICITOR-GENERAL.

CHARLES HENRY MORTON, Esq., President of the Law Society.

ELECTED MEMBERS.

T. J. C. TOMLIN, Esq., K.C.	}	Lincoln's Inn.
W. R. SHELDON, Esq.		
H. F. DICKENS, Esq., K.C.	}	Inner Temple.
SIR HUGH FRASER.		
C. C. SCOTT, Esq., K.C.	}	Middle Temple.
A. MACMORRAN, Esq., K.C.		
SIR LEWIS COWARD, K.C.	}	Gray's Inn.
EDWARD CLAYTON, Esq., K.C.		
T. R. HUGHES, Esq., K.C., of Lincoln's Inn.	}	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
E. W. HANSELL, Esq., of the Inner Temple.		
W. MELMOTH WALTERS, Esq. (Firm— Messrs. Walters & Co.).	}	The Law Society.
J. W. BUDD, Esq. (Firm—Messrs. Budd, Johnson & Jecks).		

Secretary—P. NOBLE FAWCETT, Esq., 30, Montague Street,
W.C. 1.

1920.

THE
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
AND
PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

REPORTERS.

House of Lords	H. B. HEMMING,	<i>Barrister-at-Law.</i>
Privy Council	A. M. TALBOT,	<i>Barrister-at-Law.</i>

1920.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON,
W.C. 1.

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.





JUDGES AND LAW OFFICERS.

MEMORANDA.

1920.

Feb. THE HON. MR. JUSTICE CHARLES MONTAGUE LUSH was nominated to be an *ex officio* Commissioner for England under the Railway and Canal Traffic Act, 1888.

June 18. THE RIGHT HON. LORD COZENS-HARDY, late Keeper and Master of the Rolls and Records of the Chancery of England, died at Letheringsett Hall, Holt, Norfolk, aged 81 years.

June 22. RIGBY PHILIP WATSON SWIFT, ESQ., K.C., was appointed one of the Justices of His Majesty's High Court of Justice and was afterwards knighted.

HIS HONOUR JUDGE EDWARD ACTON, one of His Majesty's Judges of County Courts, was appointed one of the Justices of His Majesty's High Court of Justice and was afterwards knighted.

June 30. SIR HENRY SUTTON, formerly one of the Justices of His Majesty's High Court of Justice, died at Sloane Gardens, London, S.W., aged 75 years.

ERRATA.

<i>Page</i>	<i>Line</i>	<i>For</i>	<i>Read</i>
6	9	"or even if with "	"or even with ".
287	14	"under Part V. (5) of the Schedule "	"Under Paragraph 5 of the Second Sched- ule."
290	9 and 27	1867	1857
309	9	A. R. Kennedy	A. R. Kennedy K.C.
373	16	t'sais	t'sip.
638	26	Wiley	James Wylie.
762	Footnote (1)	[1904] 1 K. B. 271. [1918] A. C. 304; 1918 S. C. (H. L.) 66.	
"	"	(2) [1918] A. C. 304; 1918 S. C. (H. L.) 66. [1904] 1 K. B. 271.	

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1920, will be as follows:—

In the First Series,
[1920] 1 Ch. [1920] 2 Ch.

In the Second Series,
[1920] 1 K. B. [1920] 2 K. B. [1920] 3 K. B. [1920] P.

In the Third Series,
[1920] A. C.

The SCOTTISH LAW REPORTS are cited as follows:

Shaw, or, First Series Court of Session Cases	.	.	by	S.
Dunlop, or, Second Series	"	"	"	D.
Macpherson, or, Third Series	"	"	"	M.
Rettie, or, Fourth Series	"	"	"	R.
Fraser, or, Fifth Series	"	"	"	F.
New Series	"	"	"	1907 S. C.
Scottish Law Reporter	"	"	"	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	"		Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.	PAGE		PAGE
Addar Khan <i>v.</i> Mullins — P. C.	391	Arani <i>v.</i> Public Trustee of New Zealand — — — P. C.	198
Aktieselskabet Dampskibet Hansa, Alexander & Sons <i>v.</i> — — H. L. (Sc.)	88	Armstrong City Corporation <i>v.</i> Canadian Northern Pacific Ry. Co. — — — P. C.	216
Alexander & Sons <i>v.</i> Aktieselskabet Dampskibet Hansa H. L. (Sc.)	88	Armstrong, Whitworth & Co. <i>v.</i> Redford — H. L. (E.)	757
Alston, Trinidad Shipping Co. <i>v.</i> — — — P. C.	888	Ashton & Co., London and North Western Ry. Co. <i>v.</i> H. L. (E.)	84
Amphlett, Collis <i>v.</i> — H. L. (E.)	271		

	PAGE		PAGE
Attorney-General <i>v.</i> De Keyser's Royal Hotel H. L. (E.)	508	Director of Public Prosecutions <i>v.</i> Beard - H. L. (E.)	479
Attorney-General for Hong Kong, Li Hong Mi <i>v.</i> P. C.	735	Dobbie, Coltness Iron Co. <i>v.</i> H. L. (Sc.)	916
Auger <i>v.</i> Beaudry - P. C.	1010	Dufresne, Montreal City <i>v.</i> P. C.	1017
		Düsseldorf, The - - P. C.	1034
B.		E.	
Beard, Director of Public Prosecutions <i>v.</i> - H. L. (E.)	479	Edge, North Staffordshire Ry. Co. <i>v.</i> - - H. L. (E.)	254
Beauchamp, Bourton <i>v.</i> H. L. (E.)	1001	Electric (West India) Co. <i>v.</i> Roberts - - - P. C.	1025
Beaudry, Auger <i>v.</i> - P. C.	1010	Ellerman Line, Grayson <i>v.</i> H. L. (E.)	466
Bourton <i>v.</i> Beauchamp H. L. (E.)	1001	Emerson-Brantingham Implement Co. <i>v.</i> Schofield - P. C.	415
Brown <i>v.</i> Gregson - H. L. (Sc.)	860	English, Scottish and Australian Bank, Commissioners of Taxation <i>v.</i> - - P. C.	683
C.		Esquimalt and Nanaimo Ry. Co. <i>v.</i> Granby Consolidated Mining, Smelting and Power Co. - - - P. C.	172
Canadian Northern Pacific Ry. Co., Armstrong City Corporation <i>v.</i> - - P. C.	216	Esquimalt and Nanaimo Ry. Co. <i>v.</i> Wilson - - P. C.	358
Canadian Pacific Ry. Co. <i>v.</i> Storstad Steamship - P. C.	397		
Canadian Pacific Ry. Co., Workmen's Compensation Board <i>v.</i> - - P. C.	184	F.	
Cantwell, Manton <i>v.</i> H. L. (I.)	781	Fernando, Rajapakse <i>v.</i> - P. C.	892
Cheang Thye Phin <i>v.</i> Tan Ah Loy - - - P. C.	369		
Collis <i>v.</i> Amphlett H. L. (E.)	271	G.	
Coltness Iron Co. <i>v.</i> Dobbie H. L. (Sc.)	916	Glasgow Corporation, Kemp <i>v.</i> H. L. (Sc.)	836
Commissioners of Taxation <i>v.</i> English, Scottish and Australian Bank - - P. C.	683	Gold Mining (Quesnel Forks) Co., Ward <i>v.</i> - - P. C.	222
Craig <i>v.</i> Lamoureux - P. C.	349	Granby Consolidated Mining, Smelting and Power Co., Esquimalt and Nanaimo Ry. Co. <i>v.</i> - - P. C.	172
Creelman <i>v.</i> Hudson Bay Insurance Co. - - P. C.	194	Grant, Smith & Co. <i>v.</i> Seattle Construction and Dry Dock Co. - - - P. C.	162
D.		Grayson <i>v.</i> Ellerman Line H. L. (E.)	466
Darbishire, O'Rourke <i>v.</i> H. L. (E.)	581	Gregson, Brown <i>v.</i> H. L. (Sc.)	860
Davies, Taylor <i>v.</i> - - P. C.	636		
De Keyser's Royal Hotel, Attorney-General <i>v.</i> H. L. (E.)	508		

H.		PAGE			PAGE
H.M. Submarine E14 - P. C.		403	London and North Western Ry. Co. v. Ashton & Co.		
			H. L. (E.)		84
Hamilton v. Lord Advocate			London and North Western Ry. Co. v. Hudson & Sons		
	H. L. (Sc.)	50		H. L. (E.)	324
Hollis Brothers & Co., Van Liewen v. -	H. L. (E.)	239	Lord Advocate, Hamilton v.		
Hudson & Sons, London and North Western Ry. Co. v.				H. L. (Sc.)	50
	H. L. (E.)	324	M.		
Hudson Bay Insurance Co., Creelman v. -	- P. C.	194	M'Alinden v. Nimmo & Co.		
Hutchinson v. National Refugees for Homeless and Destitute Children -	H. L. (E.)	794		H. L. (Sc.)	39
I.			McCawley v. The King -	P. C.	691
Inland Revenue Commissioners Northumberland (Duke)			Mackay & Co. v. Toronto City Corporation -	- P. C.	208
	H. L. (E.)	825	Manton v. Cantwell	H. L. (I.)	781
Insurance (Hudson Bay) Co., Creelman v. -	- P. C.	194	Marshall's Township Syndicate v. Johannesburg Consolidated Investment Co. v. -	P. C.	420
Iron (Coltness) Co. v. Dobbie			Marten v. Vestey Brothers		
	H. L. (Sc.)	916		H. L. (E.)	307
J.			Mazure, Stubbs, Ltd. v.		
Johannesburg Consolidated Investment Co., Marshall's Township Syndicate v.	P. C.	420		H. L. (Sc.)	66
Johnson v. Taylor Brothers & Co. -	- H. L. (E.)	144	Mick Simmons, Ltd. v. Rofe		
K.				P. C.	379
Kemp v. Glasgow Corporation			Mining, Smelting and Power (Granby Consolidated) Co., Esquimalt and Nanaimo Ry. Co. v. -	- P. C.	172
	H. L. (Sc.)	836	Montreal City v. Dufresne		
King v. Port of London Authority -	- H. L. (E.)	1		P. C.	1017
King's Advocate, Tsinki v.			Montreal Tramways Co. v.		
	P. C.	743	Savigny -	- P. C.	408
L.			Mullins, Addar Khan v. -	P. C.	391
Lamoureux, Craig v. -	P. C.	349	N.		
Li Hong Mi v. Attorney-General for Hong Kong	P. C.	735	National Refugees for Homeless and Destitute Children, Hutchinson v. -	H. L. (E.)	794
			Nimmo & Co., M'Alinden v.		
				H. L. (Sc.)	39
			Noordam (No. 2), The -	P. C.	904
			North Staffordshire Ry. Co. v. Edge -	- H. L. (E.)	254
			Northumberland (Duke) v. Inland Revenue Commissioners -	- H. L. (E.)	825

O.		PAGE		PAGE	
O'Rourke v. Darbishire				Rofe, Mick Simmons, Ltd. v.	379
	H. L. (E.)	581		P. C.	
Orsett Union Assessment Committee, Port of London Authority v.	- H. L. (E.)	273		S.	
Orteric, The	- - P. C.	724		Savigny, Montreal Tramways Co. v.	408
Oscar II., The	- - P. C.	748		Schofield, Emerson - Brantingham Implement Co. v.	415
Ottawa Roman Catholic Separate Schools (Trustees of) v.				Seattle Construction and Dry Dock Co., Grant, Smith & Co. v.	162
Quebec Bank	- - P. C.	230		Shipping (Trinidad) Co. v.	888
				Alston	- - P. C.
P.				Stephens, Weld-Blundell v.	956
Paquet v. Pilot's Corporation (Quebec)	- - - P. C.	1029		Storstad Steamship, Canadian Pacific Ry. Co. v.	397
Pilots' Corporation (Quebec), Paquet v.	- - - P. C.	1029		Stubbs, Ltd. v. Mazure	
Port of London Authority, King v.	- - H. L. (E.)	1			H. L. (Sc.) 66
Port of London Authority v. Orsett Union Assessment Committee	- H. L. (E.)	273		Svithiod, The	- - P. C. 718
Public Trustee of New Zealand, Arani v.	- - - P. C.	198		T.	
Q				Tan Ah Loy, Cheang Thye Phin v.	- - P. C. 369
Quebec Bank, Ottawa Roman Catholic Separate Schools (Trustees of) v.	- - P. C.	230		Taylor v. Davies	- - P. C. 636
Quebec Ry. Light, Heat and Power Co. v. Vandry	- P. C.	662		Taylor Brothers & Co., Johnson v.	- - H. L. (E.) 144
Quesnel Forks Gold Mining Co. v. Ward	- - - P. C.	222		Toronto City, Toronto Ry. Co. v.	- P. C. 426, 446, 455
				Toronto City Corporation, Mackay & Co. v.	- P. C. 208
R.				Toronto Ry. Co. v. Toronto City	- - P. C. 426, 446, 455
Rajapakse v. Fernando	- P. C.	892		Trinidad Shipping Co. v. Alston	P. C. 888
Redford, Armstrong, Whitworth & Co. v.	- H. L. (E.)	757		Tsinki v. King's Advocate	P. C. 743
Rex, McCawley v.	- - P. C.	691		U.	
Roberts, West India Electric Co. v.	- - - P. C.	1025		Union Steamship Co. of New Zealand v. Robin	- P. C. 654
Robin, Union Steamship Co. of New Zealand v.	- P. C.	654		United Counties Bank, Wilson v.	- - H. L. (E.) 102
				Urna, The	- - - P. C. 899

V.

PAGE

Vandry, Quebec Ry., Light, Heat and Power Co. <i>v.</i> P. C.	662
Van Liewen <i>v.</i> Hollis Brothers & Co. — — H. L. (E.)	239
Vestey Brothers, Marten <i>v.</i> —	307

W.

Ward, Quesnel Forks Gold Mining Co. <i>v.</i> — — P. C.	222
--	-----

PAGE

Weld-Blundell <i>v.</i> Stephens H. L. (E.)	956
West India Electric Co. <i>v.</i> Roberts — — P. C.	1025
Wilson, Esquimalt and Nana- imo Ry. Co. <i>v.</i> — — P. C.	358
Wilson <i>v.</i> United Counties Bank — — H. L. (E.)	102
Workmen's Compensation Board <i>v.</i> Canadian Pacific Ry. Co. — — P. C.	184

TABLE OF CASES CITED.

A.

		PAGE
Abbott v. Biggleswade Joint Hospital Board	9 B. W. C. C. 107	24
Acteon, The	2 Dods. 48	1035
Adam v. Ward	[1917] A. C. 309	68
Adamson v. Jarvis	4 Bing. 66	976
Addis v. Gramophone Co.	[1909] A. C. 488	104
Adkins v. Bliss	2 De G. & J. 286	448
Agius v. Great Western Colliery	[1899] 1 Q. B. 413	994
Aktieselskabet Hekla v. Bryson, Jameson & Co.	14 Com. Cas. 1	243
Alderman v. Warren	9 B. W. C. C. 507	781
Alwis v. Fernando	14 Ceylon N. L. R. 90	894
Amalgamated Railway Servants v. Osborne	[1909] 1 Ch. 163; [1910] A. C. 87	839
Anderson v. Bank of British Columbia	2 Ch. D. 644	595
Anna, The	5 C. Rob. 373	1035
Argentino, The	13 P. D. 191	132
Arnold v. Clifford	2 Sumners Circuit Court Rep. U. S. 238	998
Ashby v. White	2 Ld. Raym. 938	973
Ashcroft v. Crow Orchard Colliery Co.	L. R. 9 Q. B. 540	249
Atkinson v. Hastie	21 R. (J.) 62	921
Attorney-General v. Clarkson	[1900] 1 Q. B. 156	515
_____ v. Conduit Colliery Co.	11 Times L. R. 57	986
_____ v. Emerson	10 Q. B. D. 191	592
_____ v. Halling	15 M. & W. 687	360
_____ v. Horner	14 Q. B. D. 245	579
_____ v. Newcastle-upon-Tyne Corporation	[1899] 2 Q. B. 478	593
_____ v. Wandsworth Board of Works	6 Ch. D. 539	842
Attorney-General for Ontario v. Attorney-General for Dominion	[1896] A. C. 348	421
Attorney-General of Manitoba v. Manitoba Licence Holders' Association	[1902] A. C. 73	185
Ayr Harbour Trustees v. Assessor for Ayr	21 R. 807	277

B.

Bail v. Hunt (William) & Sons	[1912] A. C. 496	5
Baltica, The	11 Moo. P. C. 141	906
Bank of England v. Vagliano	[1891] A. C. 107	672
Bank of Toronto v. Lamb	12 App. Cas. 575	186
Barber v. Penley	[1893] 2 Ch. 447	959

	PAGE
Barber (Lionel) & Co. v. Deutsche Bank (Berlin) London Agency	[1919] A. C. 304 . . . 68
Barbour v. South Eastern Railway Company	34 L. T. 67 . . . 338
Barclay v. Russell	3 Ves. 424 . . . 366
Barnes v. Nunnery Colliery Co.	[1912] A. C. 44 . . . 1003
Barracrough v. Greenhough	L. R. 2 Q. B. 612 . . . 598
Barry v. Butlin	2 Moo. P. C. 480 . . . 350
Baudains v. Richardson	[1906] A. C. 169 . . . 357
Beasley v. Bryson, Jameson & Co.	Unreported . . . 244
Beaufort (Duke) v. Inland Revenue Commissioners	[1913] 3 K. B. 48 . . . 827
Beck v. Evans	16 East, 244 . . . 340
Beckford v. Wade	17 Ves. 87 . . . 651
Beckham v. Drake	2 H. L. C. 579 . . . 104
Bell v. Armstrong	12 B. W. C. C. 138 . . . 760
Bell & Co. v. Antwerp, London and Brazil Line	[1891] 1 Q. B. 103 . . . 158
Bennett, Ex parte	10 Ves. 381 . . . 638
Bernina, The	12 P. D. 58 . . . 468, 989
Betts v. Gibbins	2 Ad. & E. 57 . . . 961
— v. Menzies	26 L. J. (Ch.) 528 . . . 590
Bewicke v. Graham	7 Q. B. D. 400 . . . 593
Biddell Brothers v. E. Clemens Horst Co.	[1911] 1 K. B. 934; [1912] A. C. 18 . . . 145
Birch v. Wright	1 T. R. 378 . . . 533
Bissell & Co. v. Fox Bros. & Co.	51 L. T. 663; 53 L. T. 193 . . . 684
Blake v. Midland Railway Company	18 Q. B. D. 93 . . . 661
Blovelt v. Sawyer	[1904] 1 K. B. 271 . . . 760
Blower v. Great Western Railway Company	L. R. 7 C. P. 655 . . . 331
Blundell v. The King	[1905] 1 K. B. 516 . . . 521
Blyth v. Birmingham Waterworks Company	11 Ex. 781 . . . 984
Board of Education v. Rice	[1911] A. C. 179 . . . 736
Bonanza Creek Gold Mining Company v. The King	[1916] 1 A. C. 566 . . . 195
Boothby v. Patrick	11 B. W. C. C. 201 . . . 783
Bourne v. Netherseal Colliery Company	19 Q. B. D. 357; 20 Q. B. D. 606; 14 App. Cas. 228 . . . 920
Bowen v. Hall	6 Q. B. D. 333 . . . 959
Boyse v. Rossborough	6 H. L. C. 2 . . . 357
Brace v. Abercarn Colliery Company	[1891] 1 Q. B. 496; [1891] 2 Q. B. 699 . . . 922
Braithwaite and Kirk v. Cox	5 B. W. C. C. 77 . . . 8
Bree v. Marescaux	7 Q. B. D. 434 . . . 961
Brewer v. Dew	11 M. & W. 625 . . . 129
Brice v. Edward Lloyd	[1909] 2 K. B. 804 . . . 1003
British Association of Glass Bottle Manufacturers v. Nettlefold	[1912] A. C. 709 . . . 592
British Columbia Electric Railway Company v. Gentile	[1914] A. C. 034 . . . 654
v. Loach	[1916] 1 A. C. 719 . . . 469
v. Vancouver and Eastern Railway and Navigation Co.	48 Can. S. C. R. 98; [1914] A. C. 1067 . . . 427, 440
Brown v. Fisher	63 L. T. 465 . . . 351

		PAGE
Brunsdon <i>v.</i> Humphrey	14 Q. B. D. 141	131
Budden <i>v.</i> Wilkinson	[1893] 2 Q. B. 432	593
Budgett & Co. <i>v.</i> Binnington & Co.	[1891] 1 Q. B. 35	90
Bullivant's Case	{ [1900] 2 Q. B. 163; [1901] A. C. 196	582
Bullock <i>v.</i> Dodds	2 B. & Al. 258	907
— <i>v.</i> Downes	9 H. L. C. 1	794
Bulman <i>v.</i> Young	49 L. T. 736	598
Burdick <i>v.</i> Garrick	L. R. 5 Ch. 233	639
Burrows <i>v.</i> March Gas and Coke Com- pany	{ L. R. 7 Ex. 96	959
— <i>v.</i> Rhodes	{ [1899] 1 Q. B. 816	961
Bustros <i>v.</i> White	1 Q. B. D. 423	595

C.

Cable <i>v.</i> Cable	16 Beav. 507	799
Calder <i>v.</i> Parker	3 D. 477	46
Camden (Marquis) <i>v.</i> Batterbury	7 C. B. (N. S.) 864	535
Camden <i>v.</i> Cowley	1 W. Bl. 417	317
Campbell <i>v.</i> Woodilee Coal & Coke Company	{ 56 S. L. R. 498; [1920] W. N. 138	1005
Canada Paint Company <i>v.</i> Trainor	28 Can. S. C. R. 352	666
Canada Woollen Mills Company, In re Canadian Northern Pacific Railway Company <i>v.</i> New Westminster Cor- poration	{ 9 Ont. L. R. 367	639
Canadian Northern Railway Company <i>v.</i> Kelowna City	{ [1917] A. C. 602	216
Canadian Pacific Railway Company <i>v.</i> Dionne	{ 17 Brit. Col. Rep. 515	217
— <i>v.</i> Notre Dame de Bonsecours (Cor- poration of)	{ Q. R. 18 K. B. 385	666
— <i>v.</i> Parent	{ [1899] A. C. 367	186
— <i>v.</i> Roy	{ [1917] A. C. 195	187
— <i>v.</i> Toronto Corporation	{ [1902] A. C. 220	663
Capital and Counties Bank <i>v.</i> Henly	{ [1911] A. C. 461	428
Cardiff Corporation <i>v.</i> Hall	7 App. Cas. 741	68
Caroline, The	[1911] 1 K. B. 1009	42
Carr <i>v.</i> London and North Western Railway Company	6 C. Rob. 461	720
Carrington <i>v.</i> Merchants' Insurance Company	{ L. R. 10 C. P. 307	340
Carson <i>v.</i> Pickersgill & Sons	{ 8 Peters, 495	720
Castlegate Steamship Company <i>v.</i> Dempsey	{ 14 Q. B. D. 859	47
Chandler <i>v.</i> Smith	{ [1892] 1 Q. B. 854	245
Chapman <i>v.</i> Sage	{ [1899] 2 Q. B. 506	4
Chesham (Lord), In re	8 B. W. C. C. 559	8
Chilton <i>v.</i> Blair & Co.	31 Ch. D. 466	864
Choo Eng Choon <i>v.</i> Neo Chan Neo	{ 7 B. W. C. C. 607; 8 B. W. C. C. 324	1003
	{ 12 Straits Settlements L. R. 120	372

	PAGE
Churchward <i>v.</i> Ford	2 H. & N. 446 512
Clark <i>v.</i> Chambers	3 Q. B. D. 327 959
——— <i>v.</i> Cuckfield Union	21 L. J. (Q. B.) 349 209
Clarke <i>v.</i> Morgan	38 L. T. 354 999
Clegg <i>v.</i> Edmonson	22 Beav. 125 593
Cleland, <i>In re</i>	L. R. 2 Ch. 466 906
Clelland <i>v.</i> Singer Manufacturing Com- pany	7 F. 975 8
Cleverley <i>v.</i> Gas Light and Coke Company	1 B. W. C. C. 82 783
Clouston's Trustees <i>v.</i> Bullock	16 R. 937 864
Cobb <i>v.</i> Great Western Railway Company	62 L. J. (Q. B.) 335 979
——— <i>v.</i> Great Western Railway Company	63 L. J. (Q. B.) 629 986
Codrington <i>v.</i> Codrington	L. R. 7 H. L. 854 865
Cointat <i>v.</i> Myham	[1913] 2 K. B. 220 971
Colburn <i>v.</i> Patmore	1 C. M. & R. 73 961
Combe <i>v.</i> London Corporation	1 Y. & C. Ch. 631; 15 L. J. (Ch.) 80 592, 593
Comber <i>v.</i> Leyland	[1898] A. C. 524 145
Commissioners of State Savings Bank <i>v.</i> Permewan, Wright & Co.	19 C. L. R. 457 684
Compton <i>v.</i> Grey (Earl)	1 Y. & J. 154 595
Connecticut Fire Insurance Company <i>v.</i> Kavanagh	[1892] A. C. 473 264
Conway <i>v.</i> Pumpherston Oil Company	1911 S. C. 660 1006
Cook <i>v.</i> S.S. Montreal	6 B. W. C. C. 220 760
Coomber <i>v.</i> Berks Justices	9 App. Cas. 61 516
Cooper <i>v.</i> Cooper	L. R. 7 H. L. 53 865
Cooper's Case	4 C. L. R. 1304 695
Corbett's Trusts, <i>In re</i>	Joh. 591 1011
Corsican Prince, The	[1916] P. 195 750
Cotter <i>v.</i> Johnson	45 Ir. L. T. 259; 5 B. W. C. C. 568 783
Crabbe & Robertson <i>v.</i> Stubbs, <i>Ld.</i>	22 R. 860 68
Crooke's Case	1 Shower, 208 519
Cross, Tetley & Co. <i>v.</i> Catterall	Cited [1905] 2 K. B. 145 760
Crozier, Stephens & Co. <i>v.</i> Auerbach	[1908] 2 K. B. 161 145

D.

Davenport <i>v.</i> The Queen	3 App. Cas. 115 227
Davidson <i>v.</i> Burnand	L. R. 4 C. P. 117 163
——— <i>v.</i> M'Robb	{ [1918] A. C. 304; 1918 S. C. (H. L.) 66 757, 762
Davies <i>v.</i> Seisdon Union	[1908] A. C. 315 277
Deare <i>v.</i> Attorney-General	1 Y. & C. Ex. 197 367
De Bode's Case	8 Q. B. 208 521
De la Bere <i>v.</i> Pearson	{ [1907] 1 K. B. 483; [1908] 1 K. B. 280 959
Denaby Main Colliery Company <i>v.</i> Manchester, Sheffield and Lincoln- shire Railway Company	11 App. Cas. 97 258
Dennis <i>v.</i> White	[1917] A. C. 479 760
De Verteuil <i>v.</i> Knaggs	[1918] A. C. 557 736
Der Mohr, The	3 C. Rob. 129 750

		PAGE
Dewar v. Maitland	L. R. 2 Eq. 834	883
Dewsbury and Heckmondwike Water-works Board v. Penistone Union Assessment Committee	16 Q. B. D. 585; 17 Q. B. D. 384	277
Dirigo, The	[1919] P. 204	906
Dixon v. Smith	5 H. & N. 450	961
Doe v. Oliver	5 Man. & R. 202; 2 Sm. L. C. 12th Ed. 746	895
Dominion Cold Storage Company, In re	18 (Ont.) Practice Reports, 68	430
Dooly v. Great Northern Railway Company	4 E. & B. 341	47
Douglas-Menzies v. Umphelby	[1908] A. C. 224	865
Douglas' Trustees v. Douglas	24 D. 1191	864
Dudgeon v. Pembroke	2 App. Cas. 284	316
Dumphy v. Montreal Light, Heat and Power Co.	[1907] A. C. 454	663
Dundas v. Dundas	4 W. & Sh. 460	864
Dundee Gas Commissioners	9 R. 1240	277
Dundee Harbour Trustees v. Nicol	[1915] A. C. 550	840
Dutton v. Solomonson	3 Bos. & P. 582	326
Dyson v. Attorney-General	[1911] 1 K. B. 410	359

E.

Eadie v. Glasgow Corporation (No. 1)	1908 S. C. 207	842
—— v. Glasgow Corporation	1916 S. C. 163	839
Eastern and South African Telegraph Company v. Cape Town Tramways Company	[1902] A. C. 381	668
Eastern Trust Company v. McKenzie, Mann & Co.	[1915] A. C. 750	360
Egerton v. Brownlow	4 H. L. C. 149	849
—— v. Moore	[1912] 2 K. B. 308	4
Eider, The	[1893] P. 119	158
Elkins v. M'Kean	79 Penn Rep. 493	985
Ellis v. Bedford (Buke)	[1899] 1 Ch. 494; [1901] A. C. 1	360, 367
Engelhart v. Farrant	[1897] 1 Q. B. 240	959
Ettrick, The	6 P. D. 127	187
Ewing v. Glasgow Police Commissioners	Mac & Rob. 847; 15 S. 389	842

F.

Feather v. The Queen	6 B. & S. 257	517
Felkin v. Herbert (Lord)	30 L. J (Ch.) 798	592
Felstead v. The King	[1914] A. C. 534	500
Finnie v. Glasgow and South Western Railway Company	2 Macq. 177	258
Fleming v. Newton	1 H. L. C. 363	68
Ford v. Cotesworth	L. R. 4 Q. B. 127	248
Forward v. Pittard	1 T. R. 27	333
Fox, The	Edw. 311	572
Franciska, The	10 Moo. P. C. 73	1035
Frankenstein v. Gavin's Cycle Cleaning and Insurance Company	[1897] 2 Q. B. 62	593

		PAGE
Frederick VIII., The	[1917] P. 43	905
Friendship, The	6 C. Rob. 420	719
Frogner, The	[1919] P. 127	725
Fulton v. Andrew	L. R. 7 H. L. 448 . . .	350

G.

Gane v. Norton Hill Colliery . .	[1909] 2 K. B. 539 . . .	760
Gilbert v. S.S. Nizam	[1910] 2 K. B. 555 . . .	760
Glyn v. Caulfield	3 Mac. & G. 463 . . .	590
Good & Co. v. Isaacs	[1892] 2 Q. B. 555 . . .	245
Goodall v. Little	1 Sim. N. S. 155 . . .	590
Goodier's Case	1 Lewin, 76n.	497
Gorton Local Board v. Prison Com- missioners	[1904] 2 K. B. 165n. . .	519
Grand Trunk Railway Company v. Poulin	Q. R. 27 K. B. 141 . . .	408
Grayson v. South Wales and Liverpool Steamship Company	Unreported	468
Great Central Railway Company v. Banbury Union	[1909] A. C. 78	293
Great Western Railway Company v. London and County Banking Com- pany	[1901] A. C. 414	684
Green v. Cammell, Laird & Co. . .	[1913] 3 K. B. 665 . . .	5
Greenock Corporation v. Caledonian Railway Company	[1917] A. C. 556	668
Greenough v. Gaskell	1 My. & K. 98	628
Gresley v. Mousley	2 K. & J. 288	592
Griffiths v. Dudley (Earl) . . .	9 Q. B. D. 357	655
Griga v. Harelda (Owners of Ship) .	3 B. W. C. C. 116 . . .	5
Guardian Fire and Life Assurance Company v. Quebec Railway, Light and Power Company	37 Can. S. C. R. 676 . . .	666
Gumatilleke v. Fernando	21 Ceylon N. L. R. 257 . .	895

H.

H.M. Advocate v. M'Donald . . .	2 White (J. R.) 517 . . .	482
H.M. Submarine E11	Lloyd's List, June 26, 1916 .	405
Hakan, The	[1918] A. C. 148	720
Halestrap v. Gregory	64 L. J. (Q. B.) 415 . . .	985
Hamilton v. Nott	L. R. 16 Eq. 112	596
Hamilton, Fraser & Co. v. Pandorf & Co.	12 App. Cas. 518	163
Hamlyn & Co. v. Griendisveen Com- pany	6 Times L. R. 225	145
Hammersmith Railway Company v. Brand	L. R. 4 H. L. 171	667
Hammond v. Reid	4 B. & Al. 72	309
Hansen v. Donaldson	1 R. 1066	90
Harding v. Brynddu Colliery Company .	[1911] 2 K. B. 747	1003
——— v. Metropolitan Railway Com- pany	L. R. 7 Ch. 154	521
Hargreave v. Haughhead Coal Com- pany	[1912] A. C. 319	5

		PAGE
Harris v. Harris	4 Hare, 179	592
Harrison v. Harrison	[1901] 2 Ch. 136	1016
Hart v. Baxendale	16 L. T. 390	326
Hastings Corporation v. Ivall	L. R. 8 Ch. 1017	593
Hawkins v. Hamerton	16 Sim. 410	1015
Hearne v. Garton	2 E. & E. 66	452
Hector, The	8 P. D. 218	187
Hellier v. Silcox	19 L. J. (Q. B.) 295	534
Hellig Olav, The	[1919] A. C. 526	900
Helsby, In re	84 L. J. (Ch.) 682	795
Henley, In re	9 Ch. D. 469	516
Herbert v. Samuel Fox & Co.	[1916] 1 A. C. 405	9, 1003
Herring v. Janson	1 Com. Cas. 177	163
Herse v. Dufain	L. R. 4 P. C. 468	667
Hewitt's Trustees v. Lawson	18 R. 793	864
Hey v. De la Hey	[1886] W. N. 101	593
Hick v. Raymond and Reid	[1893] A. C. 22	251
Hill v. Begg	[1908] 2 K. B. 802	784
— v. New River Company	9 B. & S. 303	984
Hobbs v. Henning	34 L. J. (C. P.) 117	721
Hodge v. Attorney-General	3 Y. & C. Ex. 342	359
— v. The Queen	9 App. Cas. 117	185
Hole v. Barlow	4 C. B. (N. S.) 334	514
Holmes v. Powell	8 D. M. & G. 572	895
Holwell Iron Company v. Midland Railway Company	[1909] 1 K. B. 486	258
Hood v. Murray	14 App. Cas. 124	797
Hope v. Brash	[1897] 2 Q. B. 188	595
Hopkins v. Prescott	4 C. B. 578	848
Houison v. Metropolitan, &c., Invest- ment Association	20 S. R. (N. S. W.) 316	383
Howard v. Miller	[1915] A. C. 318	174
— v. Shaw	8 M. & W. 118	533
Hull, Barnsley, &c., Railway and Dock Company v. Yorkshire and Derbyshire Coal and Iron Company	18 Q. B. D. 761	258
Hulthen v. Stewart & Co.	[1903] A. C. 389	92, 244
Hutchison v. McKinnon	[1916] 1 A. C. 471	22

I.

Illidge v. Goodwin	5 C. & P. 190	985
Inglis v. Vaux	3 Camp. 437	309
Inland Revenue Commissioners v. Anglesey (Marquess)	[1913] 3 K. B. 48	827
— v. —	[1917] 2 K. B. 760 ; [1919] 2 K. B. 183	827
Lonsdale's (Earl) Trustees	L. R. 5 H. L. 395	156
Ireland v. Livingston	[1899] 2 Q. B. 330	4
Irons v. Davis and Timmins		

J.

Jenkins v. Bushby	35 L. J. (Ch.) 400	592
John, The	2 Dods. 336	1035
John Deere Plow Company v. Wharton	[1915] A. C. 330	186
Johnson v. Lindsay & Co.	[1892] A. C. 110	47

	PAGE
Mercier <i>v.</i> Morin	Q. R. 1 Q. B. 86 666
Mercurius, The	1 C. Rob. 80 720
Merryweather <i>v.</i> Nixon	8 T. R. 186. 968
Mersey Docks and Harbour Board <i>v.</i> Birkenhead Assessment Committee	[1901] A. C. 175 278
Cameron	11 H. L. C. 443 277
Liverpool Overseers	L. R. 9 Q. B. 84. 274
Middelburg Municipality <i>v.</i> Gertzen	L. R. S. A. 1894, A. D. 544 421
Migneault <i>v.</i> Malo	L. R. 4 P. C. 123 351
Minet <i>v.</i> Morgan	L. R. 8 Ch. 361 593
Miramichi, The	[1915] P. 71 725
Missouri Steamship Co., In re	42 Ch. D. 321 889
Mohammed Bhoj <i>v.</i> Lebbe Maricar	15 Ceylon N. L. R. 466 894
Mohun Lall Sookul <i>v.</i> Bebee Doss	8 Moo. I. A. 193 444
Monckton <i>v.</i> Attorney-General.	2 Mac. & G. 402 521
Montefiore <i>v.</i> Menday Co.	[1918] 2 K. B. 241 848
Montreal City <i>v.</i> Montreal Street Railway	[1912] A. C. 333 429
Montreal Rolling Mills Co. <i>v.</i> Corcoran	26 Can. S. C. R. 595 666
Moore <i>v.</i> Naval Colliery Co.	[1912] 1 K. B. 28 9
— <i>v.</i> Taylor	1 Ad. & E. 25 309
Morison <i>v.</i> London County and West- minster Bank	[1914] 3 K. B. 356 688
Morley's Trusts, In re	25 W. R. 825 814
Morris <i>v.</i> Edwards	15 App. Cas. 309; 23 Q. B. D. 287 593
— <i>v.</i> Lambeth (Mayor)	22 Times L. R. 22 760
Morrison <i>v.</i> Ritchie & Co.	4 F. 645 68
Mortimer <i>v.</i> Slater	7 Ch. D. 322; 4 App. Cas. 448 796
Mortimore <i>v.</i> Mortimore	4 App. Cas. 448 794
Murray <i>v.</i> Glasgow and South West- ern Railway Company	11 R. 205 258
— <i>v.</i> Inland Revenue Com- missioners	[1918] A. C. 541 827
Muschamp <i>v.</i> Lancaster and Preston Junction Railway Company	8 M. & W. 421 259
Mussoorie Bank <i>v.</i> Raynor	7 App. Cas. 321 427

N.

National Telephone Company <i>v.</i> Baker	[1893] 2 Ch. 186 668
Netherseal Colliery Company <i>v.</i> Bourne	14 App. Cas. 228 917
Neville <i>v.</i> Dominion of Canada Com- pany	[1915] 3 K. B. 556 848
Neville <i>v.</i> London <i>Express</i> Newspaper	[1919] A. C. 368 961
New Windsor Corporation <i>v.</i> Taylor	[1899] A. C. 41 519
New Zealand Shipping Company <i>v.</i> Société des Ateliers et Chantiers de France	[1919] A. C. 1 223
Newcastle Breweries <i>v.</i> The King	36 Times L. R. 276 520
Newman <i>v.</i> Zachary	Aleyn, 3 959
Ngai Lan Shia <i>v.</i> Low Chee Neo	Unreported 372
Nichols <i>v.</i> Marsland	2 Ex. D. 1 677

		PAGE
Nicholson <i>v.</i> Piper	[1907] A. C. 215	5
Nicol <i>v.</i> Aberdeen Magistrates	9 M. 306	841
Nigretia, The	2 Russ-Jap. P. C. 201	719
Norman <i>v.</i> Cole	3 Esp. 253	848
North Australian Territory Company <i>v.</i> Goldsborough	[1893] 2 Ch. 381	593
Northfield Steamship Company <i>v.</i> Compagnie L'Union des Gaz	[1912] 1 K. B. 434	88

O.

Odessa, The	[1916] 1 A. C. 145	733, 903
Ogilvie, In re	[1918] 1 Ch. 492	865
Orozembo, The	6 C. Rob. 430	719
O'Shea <i>v.</i> Wood	[1891] P. 286	598
Ostsee, The	9 Moo. P. C. 150	1035
Ottawa Separate Schools Trustees <i>v.</i> Mackell	[1917] A. C. 62	232
Ottawa Corporation	[1917] A. C. 76	231
Owen <i>v.</i> Wynn	9 Ch. D. 29	593
Owens College <i>v.</i> Chorlton-upon- Medlock Overseers	18 Q. B. D. 403	279

P.

Palm Branch, The	[1919] A. C. 272	726
Palmer <i>v.</i> Wick and Pulteneytown Steam Shipping Co.	[1894] A. C. 318	977
Parfitt <i>v.</i> Lawless	L. R. 2 P. & M. 462	350
Parker <i>v.</i> Schuller	17 Times L. R. 299	145
— <i>v.</i> S.S. Black Rock	[1915] A. C. 725	760
Parkhurst <i>v.</i> Lowten	2 Swanst. 194	590
Parkins <i>v.</i> Scott	31 L. J. (Ex.) 331	961
Pawlett <i>v.</i> Attorney-General	Hardres, 465	366
Pellworm, The	[1920] P. 347	1035
Perkins <i>v.</i> Bradley	1 Hare, 219	366
Petition of Right, In re a	[1915] 3 K. B. 649	512
Philbin <i>v.</i> Hayes	11 B. W. C. C. 85; 119 L. T. 133	760, 769
Phillips <i>v.</i> Homfray	24 Ch. D. 439	512
— <i>v.</i> London and South Western Railway Company	5 Q. B. D. 78	1026
Phipps <i>v.</i> London and North Western Railway Company	[1892] 2 Q. B. 229	260
Pitman <i>v.</i> Crum Ewing	[1911] A. C. 217	865
Pizarro, The	2 Wheat. 227	721
Playfair's Trustees <i>v.</i> Playfair	21 R. 836	864
Plumb <i>v.</i> Cobden Flour Mills Co.	[1914] A. C. 62	1003
Pollard, Ex parte	Mont. & Ch. 239	875
Ponsonby <i>v.</i> Hartley	[1883] W. N. 44	592
Porteous <i>v.</i> Watney	3 Q. B. D. 534	244
Postlethwaite, In re	35 Ch. D. 722	581
— <i>v.</i> Freeland	5 App. Cas. 599	90, 244
Postmaster-General, Ex parte	10 Ch. D. 595	538
Powell <i>v.</i> Main Colliery Company	[1900] A. C. 366; [1900] 2 Q. B. 145	7

	PAGE
Prehn v. Royal Bank of Liverpool	L. R. 5 Ex. 92 140
Prince of Wales v. Lambe	11 Beav. 213 592
Prinz Adalbert, The	[1917] A. C. 586 725
Procurator in Egypt v. Deutsches Kohlen Depot	[1919] A. C. 291 726
Pym v. Great Northern Railway Company	4 B. & S. 396 655

R.

Radley v. London and North Western Railway Company	1 App. Cas. 754 478
Ralli Brothers v. Compañia Naviera Sota y Aznar	[1920] 1 K. B. 614; [1920] 2 K. B. 287 889
Randall v. Errington	10 Ves. 381 638
— v. Lynch	2 Camp. 352 90
Rarity v. Stubbs & Co.	1 S. L. T. 74 68
Ratcliffe v. Evans	[1892] 2 Q. B. 524 962
Reg. v. Abbott	[1896] 2 I. R. 362 520
— v. Baines	Taylor's Medical Jurisprudence, 6th Ed., Vol. 1, p. 893; <i>The Times</i> , Jan. 25, 1886 501
— v. Bullivant	[1900] 2 Q. B. 163 591
— v. Cox	14 Q. B. D. 153 591
— v. Cruse	8 C. & P. 541 484
— v. Davis	14 Cox C. C. 563 488
— v. Doherty	16 Cox C. C. 306 483
— v. Doody	6 Cox C. C. 463 484
— v. Doutre	9 App. Cas. 745 545
— v. Horsey	3 F. & F. 287 484
— v. London School Board	17 Q. B. D. 738 279
— v. Luck	3 F. & F. 483 488
— v. Monkhouse	4 Cox C. C. 55 483
— v. Moore	3 C. & K. 319 486
— v. Serné	16 Cox C. C. 311 481
— v. Southampton Dock Company	17 Q. B. 83 304
— v. Stopford	11 Cox C. C. 643 483
Reid-Newfoundland Company v. Anglo-American Telegraph Company	[1912] A. C. 555 639
Rein v. Stein	[1892] 1 Q. B. 753 146
Reischer v. Borwick	[1894] 2 Q. B. 548 125
Reniger v. Fogossa	1 Plowd. 1 489
Rennie v. Reid	1908 S. C. 1051; 1 B. W. C. C. 324 784
Rex v. Broadfoot	Foster's Cr. Cas. 154 520
— v. Burrow	1 Lewin, 75 482
— v. Carlile	6 C. & P. 636 959
— v. Carroll	7 C. & P. 145 483
— v. Crewe (Earl)	[1910] 2 K. B. 576 736
— v. Crisp	7 Cr. App. R. 173 484
— v. Galbraith	8 Cr. App. R. 101 484
— v. Griffiths	Unreported 488
— v. Grindley	1 Russell on Crimes, 7th Ed., p. 88n. 483
— v. Halliday	[1917] A. C. 260 516
— v. Hampden	3 How. St. Tr. 825 514
— v. Honeyands	10 Cr. App. R. 60 484

	PAGE
<i>Rex v. Lad</i>	1 Leach, 96 488
— <i>v. Letenock</i>	12 Cr. App. R. 221 489
— <i>v. Lumley</i>	22 Cox C. C. 635 488
— <i>v. Marais</i>	[1902] A. C. 51 735
— <i>v. Marshall</i>	1 Lewin, 76 486
— <i>v. Mathieson</i>	25 N. Z. L. R. 879 485
— <i>v. Meade</i>	[1909] 1 K. B. 895 479
— <i>v. Meakin</i>	7 C. & P. 297 483
— <i>v. Moore</i>	3 B. & Ad. 184 959
— <i>v. Pearson</i>	2 Lewin, 144 483
— <i>v. Rennie</i>	1 Lewin, 76 483
— <i>v. Scholey</i>	3 Cr. App. R. 183 484
— <i>v. Thomas</i>	7 C. & P. 817 489
<i>Reynell v. Sprye</i>	11 Beav. 618 596
<i>Reynolds v. Coleman</i>	36 Ch. D. 453 158
<i>Richardson v. North Eastern Railway Company</i>	L. R. 7 C. P. 75 340
<i>Riding v. Smith</i>	1 Ex. D. 91 959
<i>Roberts v. Oppenheim</i>	26 Ch. D. 724 598
<i>Robey v. Snaefell Mining Company</i>	20 Q. B. D. 152 157
<i>Robinson v. Canadian Pacific Railway Company</i>	[1892] A. C. 481 656
<i>Rocheffaucauld v. Boustead</i>	[1897] 1 Ch. 196 651
<i>Rodgers v. Maw</i>	15 M. & W. 444 556
<i>Rogers v. Spence</i>	12 Cl. & F. 700 119
<i>Rolin v. Steward</i>	14 C. B. 595 103
<i>Ronaldson v. Mowat</i>	21 R. (J.) 55 921
<i>Rosalie and Betty, The</i>	2 C. Rob. 343 720
<i>Rose v. Buckett</i>	[1901] 2 K. B. 449 131
<i>Rosie v. Mackay</i>	1910 S. C. 714 8
<i>Ross v. London County Westminster and Parr's Bank</i>	[1919] 1 K. B. 678 684
<i>Roumanian, The</i>	[1916] 1 A. C. 124 730
<i>Rowland v. Wright</i>	[1909] 1 K. B. 963 760
<i>Royal Bank of Canada v. The King</i>	[1913] A. C. 283 186
<i>Royle, In re</i>	50 L. J. (Q. B.) 656 453
<i>Russell v. Jackson</i>	9 Hare, 387; 10 Hare, 204 858
<i>Rylands v. Fletcher</i>	L. R. 3 H. L. 330 667
<i>Ryves v. Wellington (Duke)</i>	9 Beav. 579 365

S.

<i>St. Asaph (Dean and Chapter) v. Llanrhaiadryn-Mochmant Overseers.</i>	[1897] 1 Q. B. 511 277
<i>St. George's Society of Montreal v. Nichols</i>	Q. R. 5 S. C. 273 351
<i>St. Lawrence Sugar Refining Company v. Campbell</i>	M. L. R. 1 Q. B. 290 666
<i>St. Marie v. Bourassa</i>	18 Revue Légale, 454 1016
<i>Saltoun (Earl) v. Advocate-General</i>	3 Macq. 659 53
<i>Saltpetre Case</i>	12 Rep. 12 514
<i>Saracen, The</i>	6 Moo. P. C. 56 398
<i>Sassoon & Co. v. Western Assurance Company</i>	[1912] A. C. 561 171
<i>Schlesien, The</i>	[1916] P. 225 724
<i>Schofield, Ex parte</i>	[1891] 2 Q. B. 428 452
<i>Scott v. Shepherd</i>	3 Wils. 403; 2 W. Bl. 892 959

	PAGE
Scott's Trustees <i>v.</i> Moss	17 R. 32 959
Sculcoates Union <i>v.</i> Doek Company at Kingston-upon-Hull	[1895] A. C. 136; [1894] 2 Q. B. 69 277
Searles <i>v.</i> Scarlett	[1892] 2 Q. B. 56 68
Seaton <i>v.</i> Burnand	[1900] A. C. 135 123
Sedulous, The	1 Dod. 253 405
Serraino & Sons <i>v.</i> Campbell	[1891] 1 Q. B. 283 245
Several Dutch Schuyts	6 C. Rob. 48 404
Seward <i>v.</i> Vera Cruz (Owners of)	10 App. Cas. 59 656
Shackell <i>v.</i> Rosier	2 Bing. N. C. 634 961
Sharman <i>v.</i> Holliday and Greenwood	[1904] 1 K. B. 235 42
Sharp <i>v.</i> Johnson & Co.	[1905] 2 K. B. 139 760
— <i>v.</i> Powell	L. R. 7 C. P. 253 984
Sharpe, In re	[1892] 1 Ch. 154 651
Sharpe & Co. <i>v.</i> Nosawa & Co.	[1917] 2 K. B. 814 147
Shawinigan Carbide Company <i>v.</i> Doucet	42 Can. S. C. R. 281 666
Sheffield Conservative Club <i>v.</i> Brighten	85 L. J. (K. B.) 1669; [1916] W. N. 311 514
Shelfer <i>v.</i> City of London Electric Lighting Company	[1895] 1 Ch. 287 667
Shepherd <i>v.</i> Harrison	L. R. 5 H. L. 116 725
Sisters, The	1 P. D. 117 985
Six Widows' Case	12 Straits Settlements L. R. 120 372
Sloper <i>v.</i> Saunders	29 L. J. (Ex.) 275 512
Smith <i>v.</i> Anderson	15 Ch. D. 247 784
— <i>v.</i> Clinton	99 L. T. 840 961
— <i>v.</i> Geldenhuys	1909 S. C. (T.) 330 421
— <i>v.</i> Hodson	4 T. R. 211 556
— <i>v.</i> London and South Western Railway Company	L. R. 6 C. P. 14 984
— <i>v.</i> The Queen	3 App. Cas. 614 736
Soar <i>v.</i> Ashwell	[1893] 2 Q. B. 390 639
Solomon <i>v.</i> New South Wales Sports Club	19 C. L. R. 698 385
Southern Pacific Railway Company <i>v.</i> Jensen	244 U. S. 205 187
Speight <i>v.</i> Gosnay	60 L. J. (Q. B.) 231 959
Spiers <i>v.</i> Elderslie S.S. Company	1909 S. C. 1259; 2 B. W. C. C. 205 784
Steel's Trustees <i>v.</i> Steedman	5 F. 239 864
Stewart <i>v.</i> Longhurst	[1917] A. C. 249 760
Straker <i>v.</i> Kidd & Co.	3 Q. B. D. 223 90
Stuart <i>v.</i> Crawley	2 Stark. 323 340
Stubbs, Ltd. <i>v.</i> Russell	[1913] A. C. 386; 1913 S. C. (H. L.) 14 66, 67
Sturge and Great Western Railway Company	19 Ch. D. 444 795
Südmark No. 2, The	[1918] A. C. 475 749
Sutcliffe <i>v.</i> Great Western Railway Company	[1910] 1 K. B. 478 340
Sutherland <i>v.</i> Thomson	[1906] A. C. 51 264

T.

Talbot <i>v.</i> Marshfield	2 Dr. & Sm. 549 591
Talley <i>v.</i> Great Western Railway Company	L. R. 6 C. P. 44 338

		PAGE
Tasmania, The	15 App. Cas. 223	267
Taylor, In re	52 L. T. 839	815
——— <i>v.</i> Attorney-General	8 Sim. 413	360
——— <i>v.</i> London and North Western Railway Company	[1912] A. C. 242	5
——— <i>v.</i> Metropolitan Railway Com- pany		
Thames and Mersey Marine Insurance Company <i>v.</i> Hamilton, Fraser & Co.	12 App. Cas. 484	163
Thiis <i>v.</i> Byers	1 Q. B. D. 244	90
Thom <i>v.</i> Sinclair	[1917] A. C. 127	760
Thomas <i>v.</i> Rawlings	27 Beav. 140	590
——— <i>v.</i> The Queen	L. R. 10 Q. B. 31	517
Thompson <i>v.</i> Goold & Co.	[1910] A. C. 409	9
Tobin <i>v.</i> The Queen	16 C. B. (N. S.) 310	546
Tooke <i>v.</i> Bergeron	27 Can. S. C. R. 567	666
Toronto City <i>v.</i> Grand Trunk Railway Company	37 Can. S. C. R. 232	430
Toronto Corporation <i>v.</i> Canadian Pacific Railway Company		
——— <i>v.</i> Toronto Rail- way Company	[1908] A. C. 54	427
——— <i>v.</i> Toronto City	[1907] A. C. 315	448
Travis <i>v.</i> Taylor	53 Can. S. C. R. 222	430
Tregelles <i>v.</i> Sewell	12 Jur. (N. S.) 791	813
Trinder, Anderson & Co. <i>v.</i> Thames and Mersey Marine Insurance Company	7 H. & N. 574	145
Trust and Loan Company of Canada <i>v.</i> Gauthier	[1898] 2 Q. B. 114	995
Turnbull <i>v.</i> Vickers		
Twee Gebroeders, The	[1904] A. C. 94	667
Tynron (Owners of S.S.) <i>v.</i> Morgan	7 B. W. C. C. 396	24
Tyrell <i>v.</i> Painton	3 C. Rob. 162, 336	1035
	[1909] 2 K. B. 66	5
	[1894] P. 151	350

U.

United Service Co., In re	L. R. 6 Ch. 212	962
United States, The	[1917] P. 30	905

V.

Valeria, The	[1920] P. 81	1035
Vaughan <i>v.</i> Taff Vale Railway Com- pany	5 H. & N. 679	681
Vicars <i>v.</i> Wilcocks		
Victoria, The	8 East, 1	959
Vine, Ex parte	13 P. D. 125	398
Vrouw Judith, The	8 Ch. D. 364	131
Vrouw Anna Catharina, The	1 C. Rob. 150	720
	5 C. Rob. 15	1035

W.

Waite <i>v.</i> Littlewood	L. R. 8 Ch. 70	1016
Walters <i>v.</i> Staveley Company	4 B. W. C. C. 89, 303	760
Ward <i>v.</i> Weeks	7 Bing. 211	956

	PAGE
Ware v. Rowland	2 Ph. 635 798
Warkworth, The	9 P. D. 145 187
Waterous Engine Works Company v. Palmerston Corporation	21 Can. S. C. R. 556 208
Watkins v. Guest, Keen and Nettlefolds	5 B. W. C. C. 307 1003
Webster v. Cohen Brothers	6 B. W. C. C. 92 4
West Kent Main Sewerage Board v. Dartford Union Assessment Committee	[1911] A. C. 171 277
Wharton v. Barker	4 K. & J. 483 794
Wheaton v. Maple	[1893] 3 Ch. 48 516
Wheeler v. Addams	17 Beav. 417 799
Wiedeman v. Walpole	24 Q. B. D. 537 595
Williams v. Mersey Docks and Harbour Board	[1905] 1 K. B. 804 655
——— v. Vauxhall Colliery Company	[1907] 2 K. B. 433 783
Willis v. Gipps	5 Moo. P. C. 379 736
Wilson, In re	[1907] 1 Ch. 450; [1907] 2 Ch. 572 794, 797
——— v. McIntosh	[1894] A. C. 129 448
——— v. United Counties Bank	[1920] A. C. 102; 88 L. J. (K. B.) 1033 263
Wilson, Sons & Co. v. Xantho (Owners of Cargo of)	12 App. Cas. 503 163
Wi Matua's Will, In re	[1908] A. C. 448 200
Windsor, &c., Railway Company v. The Queen	11 App. Cas. 607 517
Wingrove v. Wingrove	11 P. D. 81 357
Witherspoon v. East Williams Town-ship	[1919] Ont. W. N. 305 209
Withy v. Mangles	10 Cl. & F. 215 796
Wood v. Edinburgh Evening News	1910 S. C. 895 68
Wright v. New Zealand Shipping Company	4 Ex. D. 165 245
Wyllie v. Harrison & Co.	13 R. 92 244
Wyman v. Paterson	[1900] A. C. 271 47
Wynne v. Humberston	27 Beav. 421 592

Y.

Yeap Chea Neo v. Ong Cheng Neo	L. R. 6 P. C. 381 372
Young v. Leamington Corporation	8 App. Cas. 517 208

Z.

Zade v. Tsinki	9 Cyprus L. R. 68 746
Zamora, The	[1916] 2 A. C. 77 514, 749
Zetland (Earl) v. Lord Advocate	4 R. 199; 3 App. Cas. 505; 5 R. (H. L.) 51 53, 64

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

[HOUSE OF LORDS.]

KING APPELLANT ;	H. L. (E.)*
AND	1919
PORT OF LONDON AUTHORITY . RESPONDENTS.	July 1.

Workmen's Compensation—Latent Injury—No present Incapacity—Probability of future Incapacity—Jurisdiction of Arbitrator to make Award—Form of Order—Time for making Claim for Compensation—Failure to make Claim within specified Period—Reasonable Cause—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-ss. 1, 2 (a), 3; s. 2, sub-s. 1, proviso (b); Sched. I, par. 1 (b).

Where an applicant in arbitration proceedings under the Workmen's Compensation Act, 1906, has sustained an injury within the meaning of the Act, but no present incapacity has resulted therefrom; but the evidence shows that there is a reasonable probability of incapacity arising in the future, the arbitrator has jurisdiction to make an award. In such a case the proper form of order is to declare, in the terms of s. 1, sub-s. 1, that the applicant has sustained an injury by accident, and, after reciting the effect of the evidence as to incapacity, to adjourn the application, with liberty to either party to apply.

In determining whether the failure of an injured workman to make

* *Present* : LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD ATKINSON, LORD PARMOOR, and LORD WRENBURY.

H. L. (E.)

1919

KING

v.

PORT

OF

LONDON
AUTHORITY.

a claim for compensation within six months of the accident, as required by s. 2, sub-s. 1, of the Act, has been occasioned by reasonable cause, the arbitrator may take into consideration the fact that the workman has been given light work at the same wages as he was earning before the accident; but the question must be determined by the facts of the particular case, and it is the duty of an arbitrator who finds reasonable cause to set out plainly the facts upon which that conclusion is based.

Luckie v. Merry [1915] 3 K. B. 83 approved.

Observations upon the duty of the arbitrator to distinguish clearly between his findings of fact and his findings of law, or of mixed law and fact.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal setting aside an award made by the judge of the City of London Court under the Workmen's Compensation Act, 1906.

The appellant was for some years prior to December 18, 1915, a dock labourer in the employ of the respondents at 29s. per week. From his youth up his right eye had been practically useless, but it caused him no pain and was not a disfigurement.

On December 18, 1915, whilst unloading the s.s. *Comery Castle* at the East India Dock, the appellant was struck in the right eye by an empty rope sling, but he remained at work during the day. The appellant immediately reported the accident to a clerk of the respondents, and an entry of the accident was made in the ordinary course in the respondents' Accident Report Book. After finishing his work the appellant went to an ophthalmic hospital and saw a doctor, who recommended the removal of the eye; but this the appellant declined to have done. He continued at his ordinary work until January 11, 1916, when, the inflammation of the eye having increased, he saw the respondents' superintendent and was given a lighter job at the same wages. The appellant worked at this job till March 24, when he resumed his ordinary work, and he continued thereat without interruption until February, 1917. He then applied for admission to membership of a sick club, open to employees of the respondents, and was examined for that purpose by the respondents' doctor. As the result of that examination the respondents learned for the first time of his defective eyesight, and in consequence

thereof they gave him notice of dismissal on February 10 for February 21. On February 28 the appellant's solicitor wrote to the respondents claiming compensation from the date of dismissal, and on July 12, 1917, the appellant commenced arbitration proceedings in the City of London Court. Soon after his dismissal the appellant obtained similar employment in the open market at an increased wage, and was still in the same employment at the hearing of the arbitration proceedings. The appellant by his particulars admitted that he was suffering from no present incapacity, but he claimed a suspensory award of 1*d.* a week, or, alternatively, a declaration of the respondents' liability to pay him compensation, if in consequence of the accident he should thereafter become totally or partially incapacitated for work.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.

The respondents contended (1.) that no question as to their liability had arisen, as the appellant had not been incapacitated by the accident; and (2.) that the failure of the appellant to make a claim for compensation within six months of the accident was a bar to the proceedings. The medical evidence at the hearing was to the effect that the accident had aggravated the disease in the eye, and would probably precipitate the necessity for removal.

The county court judge, upon the question of delay, was of opinion that the circumstances of the case were such as to enable him to afford the relief provided by the second proviso to s. 2, sub-s. 1, of the Act; and, upon the question of jurisdiction to make an award in the absence of incapacity, he thought that, if he was satisfied that a workman had sustained injury by accident within the meaning of the Act, he was entitled to declare that there was a liability attaching to the employer, though it might never fructify.

He therefore by his award made a declaration of the liability of the respondents to pay compensation to the appellant, should it thereafter be shown that he was unable to earn his full wages by reason of the accident.

The Court of Appeal (Swinfen Eady L.J., Bankes L.J., and Neville J.) set aside the award on the grounds (1.) that there was no evidence upon which the judge could competently

H. L. (E.) find **any** reasonable prospect of future incapacity; and (2.) that
 1919 there was no finding by the judge that the appellant's failure to
 KING make a claim for compensation within the six months was
 v. occasioned by reasonable cause.
 PORT

OF
 LONDON
 AUTHORITY.

May 23, 26, 27, 29. *Rigby Swift K.C.* and *G. C. Kingsbury*
 for the appellant.

1. As to the failure to make a claim within the six months, upon the evidence the county court judge was entitled to hold that the failure was occasioned by reasonable cause on the principle laid down in *Luckie v. Merry* (1). *Egerton v. Moore* (2) and *Webster v. Cohen Brothers* (3), where it was held that there was no reasonable cause for the delay, were both cases of giving notice of the accident. A distinction has always been drawn between notice of the accident, which it is important should be given at the earliest possible time, and the claim for compensation.

2. As to the absence of damage, in *Irons v. Davis and Timmins* (4), which was a decision under the Act of 1897, the Court was met with the difficulty that the Act had not in express terms made any provision for the case of a workman who had sustained injury by accident within the meaning of the Act, but was kept on at his old wages, and by consent an order was made reducing the weekly payment to a nominal sum in order to preserve to the applicant the right to apply for a review if necessary. That was the origin of the suspensory award. In *Chandler v. Smith* (5) Vaughan Williams L.J. met the difficulty by proposing that a declaration of liability should be made and the question of the amount of compensation adjourned. Since that time the Courts have always adopted the device either of awarding a weekly payment of 1d. or of making a declaration of liability; but in practice the 1d. a week order has been almost universally adopted. The orders in *Irons v. Davis and Timmins* (4) and *Chandler v. Smith* (5) were known to exist when the Act of 1906 was passed, and the Legislature, by doing nothing in the matter,

(1) [1915] 3 K. B. 83.

(3) (1913) 6 B. W. C. C. 92.

(2) [1912] 2 K. B. 308.

(4) [1899] 2 Q. B. 330.

(5) [1899] 2 Q. B. 506.

impliedly recognized these forms of order. Neither form of order has been declared illegal. The legality of the *ld.* a week order was called in question in this House in *Nicholson v. Piper* (1), but the point was left open, and the practice has since been continued (see *Owners of s.s. Tynron v. Morgan* (2)), and has been recognized by this House in *Taylor v. London and North Western Ry. Co.* (3) On principle the question whether a weekly payment has been made in the first instance is not material as to the jurisdiction of the arbitrator to make a suspensory order. As a general rule these orders have been made upon an application to review, but the arbitrator has the same jurisdiction upon an original application: *Green v. Cammell, Laird & Co.* (4); *Griga v. Owners of Ship Harelda.* (5) No doubt the *ld.* a week order cannot be applied to a case in which no payment has been made, but then is the time for the alternative form of order proposed by Vaughan Williams L.J. Where there is an injury and no present pecuniary loss, but a reasonable probability of loss in the future, the proper form of order is to find the injury and let the application stand over. If the exact order of the county court judge does not properly express the form of order that ought to be made in this case to protect the workman's rights it is open to your Lordships to lay down the proper form of order; but in substance the county court judge is right. In the Court of Appeal the form of the order was not in question, but the question was as to the application of the principle to the facts of the case. *Ball v. William Hunt & Sons* (6) shows that the removal of a man's sightless eye is a fact which the county court judge may properly take into account in considering whether the workman is entitled to compensation. *Hargreave v. Haughhead Coal Co.* (7) has no bearing on the question. The medical evidence before the county court judge was amply sufficient to justify him in coming to the conclusion that

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.

(1) [1907] A. C. 215, 218, 221.

(2) [1909] 2 K. B. 66.

(3) [1912] A. C. 242.

(4) [1913] 3 K. B. 665, 669, 673.

(5) (1910) 3 B. W. C. C. 116.

(6) [1912] A. C. 496.

(7) [1912] A. C. 319.

H. L. (E.) 1919 there was a reasonable probability of incapacity arising in the future. The Court of Appeal went wrong in shutting their eyes to this evidence, and the award put into more suitable language should be restored.

KING
v.
PORT
OF
LONDON
AUTHORITY.

Sir John Simon K.C. and C. B. Marriott for the respondents.

1. Where there is no present incapacity it is not competent to the arbitrator to make a declaration of liability. The Workmen's Compensation Act, 1906, does not purport to deal with accidents as such, or even if with injuries as such ; it deals with personal incapacity. In the form of application attached to the rules made under this Act the particulars include " particulars of incapacity for work," and it is only in that case that any compensation arises. The workman says in reply to that, " No incapacity at present." On these facts the arbitrator had no jurisdiction to make any award. The jurisdiction of the arbitrator is a statutory jurisdiction conferred by this Act and not otherwise, and there must exist as conditions precedent to the exercise of that jurisdiction (1.) an accident ; (2.) personal injury ; (3.) incapacity ; (4.) a loss to be measured in money. By s. 1, sub-s. 1, the employer " shall be liable to pay compensation, subject as hereinafter mentioned, in accordance with the First Schedule to this Act." That schedule limits the right to compensation to death or incapacity. Sub-s. 2 (a) of s. 1 shows that unless the workman is disabled for at least one week there is no liability at all, and sub-s. 3 shows that the arbitrator has no jurisdiction until the question of liability arises. Where no incapacity has arisen no award can be made against the employer, because there is no dispute and the proceedings are coram non judice. In determining loss of capacity it is conceded that the fact that the man is receiving the same wages as before the accident is not conclusive, because part of that payment may be bounty, but he must prove, not that there may be or will be incapacity, but that there is. The test of his right to compensation is present loss of earning capacity. Incapacity for work is measured by the workman's wage-earning value in the market, and if that is the same after as before the accident the arbitrator has

no jurisdiction. At the time when *Irons v. Davis and Timmins* (1) and *Chandler v. Smith* (2) were decided it was thought that the claim for compensation was the initiation of proceedings before the arbitrator, and that unless the workman got his claim before the arbitrator within six months he was shut out altogether; but this was set right by the House of Lords in *Powell v. Main Colliery Co.* (3), and the reason for those two decisions ceased. It would require very clear language in the Workmen's Compensation Act to entitle an arbitrator to order payment of 1*d.* a week where no money is payable or to make a declaration of liability where there is no liability. By the plain terms of the statute the arbitrator has no original jurisdiction to make an award against an employer in a case in which up to the time when the application is made there has never been any incapacity arising from the accident; his jurisdiction does not extend to cases of anticipated or expected incapacity. The arbitrator cannot take upon himself the functions of a prophet. *Ball v. William Hunt & Sons* (4) does not conflict with this view, because there the disfigurement already existed and the incapacity resulted from it. The order in *Chandler v. Smith* (2) was not authorized by the Act; it was a straining of the Act under a mistaken view of construction. The point now under consideration was not argued, and it was admitted that the man's earning power was reduced. It may be that that is sufficient to justify a nominal award, although there was no actual money loss because the employer was paying the workman his full wages, and that the decision may be supported on that ground. The authorities in the House of Lords, and most of the authorities in the Court of Appeal, which appear to countenance a suspensory order, are really to be explained on the ground that under Sched. I., para. 16, when incapacity has existed and weekly payments are being made, the arbitrator has jurisdiction to keep alive the liability. That is a different thing from creating a liability where none

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.

(1) [1899] 2 Q. B. 330.

(3) [1900] A. C. 366; [1900]

(2) [1899] 2 Q. B. 506.

2 Q. B. 145.

(4) [1912] A. C. 496.

H. L. (E.) has ever existed. Para. 16 assumes that (whether by
 1919 contentious litigation or by agreement) an incapacity has
 KING historically existed, and it in no way impinges upon the
 v. respondents' argument on this point. Even in cases of review,
 PORT if the arbitrator has come to the conclusion that the liability
 OF is finally dead, he cannot make a suspensory order. The
 LONDON three cases in the House of Lords on this point—*Nicholson*
 AUTHORITY. v. *Piper* (1); *Taylor v. London and North Western Ry. Co.* (2);
 and *Hargreave v. Haughhead Coal Co.* (3)—are all cases of
 review, as are most of the cases in the Court of Appeal. See
Owners of s.s. Tynron v. Morgan (4) and *Braithwaite and Kirk v.*
Cox. (5) In *Green v. Cammell, Laird & Co.* (6) the application
 was made after there had been an agreement between the
 parties, and was equivalent to an application to review. Swinfen
 Eady L.J. went wrong in not bearing this distinction in mind.
 In *Chapman v. Sage & Co.* (7) the majority of the Court of
 Appeal do appear to have taken the view that upon an
 original application it was competent to the arbitrator to make
 a nominal award. *Griga v. Owners of Ship Heraldia* (8) was
 also a case of an original application. In Scotland it is settled
 by *Rosie v. Mackay* (9), following *Clelland v. Singer Manufac-*
turing Co. (10), and disapproving *Owners of s.s. Tynron v.*
Morgan (4), that it is incompetent for an arbitrator to make
 a nominal order to provide for future incapacity either upon
 an original application or upon a review, though it is not
 necessary for the respondents to put their case so high as
 that. This argument does not involve that a workman
 who has made an application at a time when no dispute has
 arisen is debarred by the dismissal of that application from
 pursuing his remedy when the dispute arises, for the arbitrator
 has no jurisdiction unless there is an injury by accident plus
 incapacity, and his decision does not operate as a *res judicata*.
 It may be objected that a workman who is suffering from
 no immediate incapacity may be unable to make a claim

(1) [1907] A. C. 215.

(2) [1912] A. C. 242.

(3) [1912] A. C. 319.

(4) [1909] 2 K. B. 66.

(5) (1911) 5 B. W. C. C. 77.

(6) [1913] 3 K. B. 665.

(7) (1915) 8 B. W. C. C. 559.

(8) 3 B. W. C. C. 116.

(9) 1910 S. C. 714.

(10) (1905) 7 F. 975.

within the statutory period of six months. It is suggested that a claim may be made though no incapacity has arisen ; that there may be a claim when there is no dispute, although there cannot be an arbitration unless there is a dispute. The importance of the claim is that it affects the employer's mind with notice that the injury is one in respect of which the workman intends to proceed under the Workmen's Compensation Act, and does not intend to pursue his other remedies. The claim is a preliminary to the formal proceedings to be taken before the arbitrator, and forms no part of those proceedings (*Powell v. Main Colliery Co.* (1)), and it need not specify the amount of compensation claimed : *Thompson v. Goold & Co.* (2) On the other hand it may be the true view that unless a workman can serve a claim for present compensation within the six months he does not bring himself within the Act at all. It was not intended that there should be an indefinite liability hanging over the employer to pay compensation. The object of the Legislature was that these matters should be settled with reasonable despatch.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.

2. Assuming that the arbitrator had jurisdiction to make a declaration of liability, the circumstances of the case were not such as to justify the declaration. The arbitrator ought not to make a declaration of liability unless there is evidence showing a reasonable probability of incapacity hereafter arising : *Leverington v. A. Dodman & Co.* (3)

3. The claim for compensation was admittedly not made in time, and upon the evidence there was no reasonable cause for the delay. The county court judge cannot by finding in the words of the statute that there was reasonable cause, without finding any facts to support that conclusion, justify or excuse the lapse of time : *Herbert v. Samuel Fox & Co.* (4) Reasonable cause is a question of law : *Moore v. Naval Colliery Co.* (5) If there was a latent injury the risk of which did not come to the notice of the workman until the six months

(1) [1900] A. C. 366.

(3) [1916] 1 K. B. 964.

(2) [1910] A. C. 409.

(4) [1916] 1 A. C. 405, 413.

(5) [1912] 1 K. B. 28, 34.

H. L. (E.) were up that might be a reasonable cause excusing the delay,
 1919 but where the evidence shows that the workman knew the
 KING risk he was running within a few weeks of the accident, then
 v. there is no reasonable cause. *Luckie v. Merry* (1) is dis-
 PORT tinguishable by reason of the personal relation existing between
 OF the employer and the workman.
 LONDON
 AUTHORITY.

The House took time for consideration.

1919. July 1. LORD BIRKENHEAD L.C. My Lords, this is an appeal against an order of the Court of Appeal setting aside an award under the Workmen's Compensation Act, 1906, made on November 1, 1917, by Judge Atherley Jones, judge of the City of London Court. The facts of the case, which are not in controversy, are fully set out in some of your Lordships' judgments, which I have had the advantage of reading, and I do not think it necessary to repeat them. The judgment of the learned county court judge is unfortunately lacking in lucidity; and it is by no means easy to discover the grounds upon which his decision was based. This circumstance is responsible for much of the difficulty which was felt in the Court of Appeal and by your Lordships. I have, however, formed the view that the decision of the Court of Appeal cannot be supported, and, though I hesitated for some time upon this point, I have reached the further conclusion that it is not necessary to remit the matter to the learned county court judge for more scientific consideration.

Two points alone require decision, and I deal with them in order. The first is whether the incapacity, which is a condition precedent to liability under the Act, means incapacity at the actual moment of the arbitration, or whether it includes the case of latent incapacity. The question may be stated somewhat more elaborately: Where an applicant has met with personal injury which has not produced incapacity at the date of the arbitration, but which is of such a nature that it is probable that partial or total incapacity may ensue as a result, has the arbitrator jurisdiction to make an award? The question is one of very great importance. Even if,

(1) [1915] 3 K. B. 83.

as I think, it must be answered affirmatively, it is still one in which appellate tribunals require, upon the question of fact, the assistance of those who sit as arbitrators at first instance. Your Lordships have not in this case received such assistance ; it is not even plainly found that it is reasonably probable that partial or total incapacity may ensue as a result of the personal injury which the workman sustained. I am, however, of opinion that this is what the learned county court judge intended to find. Otherwise much, if not all, of his judgment would be absolutely unintelligible.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord
Birkenhead L.C.

Adopting this view, I address myself to the argument pressed upon your Lordships, with great ingenuity, by Sir John Simon. That argument was in effect that inasmuch as no existing incapacity had been proved before the arbitrator, he was bound, on a true construction of the Act, to dismiss the applicant's claim. It is not denied that if this contention were adopted much hardship might be occasioned to an applicant who had sustained personal injury, indisputably carrying with it the seeds of future incapacity, but not exhibiting that incapacity at the moment when the arbitration was held, and when in his interests it ought to be held. Nevertheless it would, of course, be necessary to adopt this view, surprising as the consequences might be, if a proper construction of the Act required it. I am, however, of the opinion that the Act cannot and ought not to be so construed. Sect. 1, sub-s. 1, of the Act provides that the employer is liable to pay compensation where the workman has sustained an injury arising out of and in the course of his employment. It is quite true that under the terms of that sub-section the compensation is to be paid in accordance with the first schedule to the Act, but your Lordships have long since laid it down in clear and unambiguous language that the first provision contains the ruling enactment, and that the words "in accordance with the schedule to the Act" are not restrictive of the right of the workman. Sect. 1, sub-s. 3, of the Act provides for the settlement by the arbitrator of any question arising in any proceedings under the Act as to the liability to pay compensation. It was argued upon this sub-section by Sir

H. L. (E.) John Simon that no such question could arise unless it is alleged
 1919 that the present liability to pay has actually occurred. I am
 KING unable to agree with this argument. I can find nothing in
 v. the sub-section which excludes the case of a present injury
 PORT which is reasonably likely to lead to incapacity for work in
 OF the future. And if this sub-section contains no such exclusion
 LONDON there is certainly none to be found in any other part of the
 AUTHORITY. Act. In my opinion, therefore, this argument altogether
 fails. I confess that I form this opinion with pleasure. It
 Lord would, in my view, have been disastrous if it were necessary
 Birkenhead L.C. to adopt a construction of the Act which excluded from its
 operation the case of an applicant in respect of whom it was
 proved (1.) that he had sustained injury by accident arising
 out of and in the course of the employment; (2.) that there
 was no incapacity at the moment; but (3.) that it was
 reasonably probable that incapacity would arise at a later
 day. Common-sense and justice alike require that in such
 a case the door should not be closed to the applicant, and it
 is satisfactory that your Lordships should have reached a
 clear conclusion on this point. The evident hardship of the
 opposite view to the applicant is not cured by the prospect
 of a later hearing. The necessary witnesses in such cases
 are often fugitive; and the just claim of the applicant might
 easily be destroyed by the indefinite postponement of a hearing.

I have only to add upon this part of the case that, if I am
 right in supposing that the learned county court judge intended
 to find in fact that future incapacity was reasonably probable
 as a result of the accident, he had before him ample material
 upon which he might properly found that conclusion. In
 the valuations of the employment market there is a difference
 between a one-eyed man and a two-eyed man. Indeed,
 the behaviour of the respondents in this very case made
 it plain that they were fully alive to this elementary
 circumstance.

A form of order which I have drafted after consultation with
 my noble friend Lord Atkinson seems to me very suitable
 for adoption in such cases as the present. It is in the following
 terms: "It is hereby declared that the claimant has received

an injury by accident arising out of and in the course of his employment; but inasmuch as the evidence has not established that up to the date hereof the applicant has, as a result of such injury, been incapacitated for work for any period, but has on the other hand established that there is a reasonable probability that such incapacity may ensue, it is ordered that this arbitration do stand adjourned reserving to each of the parties hereto liberty to make such further application in the matter of this arbitration as he or they may be advised."

H. L. (E.)
1919
KING
PORT
OF
LONDON
AUTHORITY.
Lord
Birkenhead L.C.

I proceed to consider the second point. The accident in this case was on December 18, 1915. No claim for compensation was made within six months from its occurrence. Sect. 2, sub-s. 1, of the Act contains the following provision: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that . . . (b) the failure to make a claim within the period above specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause."

The arbitrator's finding upon this part of the case is contained in the following passage: "With regard to the present contention, namely, that the claim was not made within six months, I think the circumstances disclosed in this case, which I need not elaborate, are such as to enable me to afford the relief which is provided by the second proviso to the second section of the statute. I think that proviso is applicable to this case."

The terms of this finding are highly obscure and unfruitful. It was the duty of an arbitrator to set out plainly

H. L. (E.) the facts which led him to the conclusion that the
 1919 proviso was applicable. But here, again, I have formed
 KING the view, exploring my way doubtfully through the
 v. language in which his judgment is expressed, that the learned
 PORT county court judge has in effect, though in a very unsatis-
 OF factory manner, found that the facts proved before him,
 LONDON and available for your Lordships' consideration, amounted
 AUTHORITY. to reasonable cause. And I am of opinion that there was
 evidence before him which entitled him to reach the
 Lord conclusion which, in my view, he formed.
 Birkenhead L.C.

The facts in the present case are by no means unlike those disclosed in *Luckie v. Merry* (1), and upon the facts of that case I approve of the decision in that case. I expressly guard myself against the supposition that I lay down any general principle that under all circumstances the continued payment of the same wages by the employer to the injured workman after the accident amounts to reasonable cause for not giving notice. The general atmosphere must always be considered. It is sufficient for me to say that the evidence given before the county court judge justified, without perhaps requiring, the conclusion that the workman made no formal claim for compensation because he formed the view, encouraged thereto by the conduct of the employer, that he would receive compensation, should incapacity supervene in the future, without the necessity of making a formal claim. It is very easy to imagine cases in which the attitude of the employer during the critical six months may appear to be at once so promising and so generous that there is very reasonable cause for an omission to give notice. There are other cases falling upon the other side of the line. It is enough for me to say that in my opinion the present case belongs to the first class. It is perhaps proper for me to add that, although the subject was frequently referred to in debate, it is not necessary for the purpose of the decision to discuss the alternative practice of ordering, on an original application or otherwise, a nominal payment in order to keep alive a claim founded upon the prospect of incapacity in future as the result of the accident.

(1) [1915] 3 K. B. 83.

I prefer the method carried out by the order which I venture to recommend to your Lordships, but I ignore neither the weight nor the number of the decisions which have sanctioned the alternative course.

My Lords, for the reasons given above, I am of opinion that this appeal should be allowed with costs, and I move your Lordships accordingly.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord
Birkenhead L.C.
Viscount Finlay.

VISCOUNT FINLAY. My Lords, this is a case arising under the Workmen's Compensation Act, 1906. The appellant was a workman in the employment of the respondents. While at work he was struck in the right eye, and a claim for compensation under the Act was made. The case came before Judge Atherley-Jones as arbitrator, and he made an award in the following terms: "I order that there be a declaration of the liability of the respondents to pay compensation to the applicant should it hereafter be shown that he is unable to earn full wages by reason of the accident, the subject-matter of this arbitration." The Court of Appeal allowed an appeal from this decision, and set the award aside, ordering that an award should be entered in favour of the respondents with costs. The applicant has appealed to your Lordships' House, and asks that the award of Judge Atherley-Jones should be restored. Two points arise for determination. 1. Whether it was competent for the arbitrator in a case under the Workmen's Compensation Act to make such an award, incapacity to earn wages not having yet resulted from the accident; and 2. whether the omission in this case to make a claim for compensation within six months was a bar to the proceedings, or whether it was excused on the ground that the failure was occasioned by reasonable cause within the meaning of s. 2 (1.) (b) of the Act. I shall deal with these two points separately.

1. The appellant had suffered from disease of the right eye for a long time, and although he could distinguish light from darkness with it he could not discern objects. On December 18, 1915, while at work, he was struck in the right eye by a rope sling. Inflammation resulted. He was kept

H. L. (E.) on in the employment of the respondents at lighter work,
 1919 but was paid his regular wages as before, and on March 21,
 KING 1916, he returned to his old work and remained at it till
 v. February 21, 1917, when he was dismissed. On the 28th of
 PORT the same month a letter was written to the respondents by
 OF the appellant's solicitors claiming compensation, and a formal
 LONDON application was made in the City of London Court on July 12,
 AUTHORITY. 1917. The application stated that questions had arisen
 Viscount Finlay. as to the liability of the respondents to pay compensation
 under the Act, and as to the duration of the compensation.
 In the particulars under the sixth head, which required a
 statement of particulars of incapacity for work, it was stated
 by the applicant that there was "no incapacity at present."
 The respondents by their answer claimed that the proceedings
 should be dismissed with costs on the ground that it was
 admitted by para. 6 of the applicant's particulars that the
 applicant had not been incapacitated as a result of the accident.

The case was heard by Judge Atherley-Jones on September 25,
 1917. Mr. Arnold Lawson, the senior surgeon at Middlesex
 Hospital, was called as a witness for the applicant, and stated
 that the right eye was blind, that he considered it desirable
 that it should be removed, and that its condition was due
 to the aggravation caused by the accident. He further said
 that it would be desirable to remove the eye, and that it
 was a diseased eye before the accident; and added: "apart
 from the accident, not now but in the future, it might be
 necessary to remove the eye."

The medical evidence for the respondents was substantially
 to the same effect, namely, that the accident had aggravated
 the condition of the disease in the eye, and precipitated
 probably the necessity for removal.

The arbitrator in his award, after reviewing the evidence,
 and the terms of the Act, and the practice which has grown
 up of making what are called "suspensory orders," said
 (Appendix, p. 20, D): "I think that if I am satisfied, following
 the words of the statute, that a personal injury by accident
 has arisen to the employee while in the employment and
 within the scope, etc., etc., of his employment, I am entitled

to declare that the liability does exist, not to order what comes under the suspensory provision, but I am entitled to say that there is a liability attaching to the employers, though it may never fructify; that is to say, the employers may never be called upon to pay anything, but there is liability arising from the accident which resulted in the injury to this man." An award was accordingly made in the terms which I have set out above.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Viscount Finlay

The Court of Appeal set this award aside, saying: "The facts show that there is no possibility of incapacity in the future as the result of the accident." (Appendix, p. 28A.) And again: "The right eye of the man has always been useless, and the fact of any possible or probable recurrence of any effects of the accident is negatived by the evidence." (Appendix, p. 28G.)

It seems quite clear on the evidence that the effect of the accident, in all probability, will be that the eye will have to be removed at an earlier date than that at which, but for the accident itself, removal would be necessary. The removal of the right eye would affect the wage-earning capacity of the workman. It is true that the right eye was not, before the accident, useful for purposes of vision, but when the eye has been removed the man will be evidently a one-eyed man, and for that reason may be less likely to get employment. The condition of the right to compensation is not incapacity to work, but incapacity for work; and when one eye has been removed, as, on the medical evidence, this eye will have to be removed before it would otherwise have been necessary, the wage-earning capacity of the man may be diminished owing to the fact that on the view he will then be a one-eyed man. It was open to the arbitrator to find that this was a probable result of the accident. Whether and how far such incapacity for work in fact results from the removal of the right eye, is a question that will have to be determined when the event occurs; but in my opinion it was quite open to the arbitrator to find that it is a probable consequence of the accident in the future. On appeal to your Lordships' House it was strongly contended for the

H. L. (E.) 1919
 KING
 v.
 PORT
 OF
 LONDON
 AUTHORITY.
 Viscount Finlay.

respondents that actual incapacity at the time when the application under the Act was made by which the proceedings are initiated is a condition precedent to any award in favour of the applicant. It was argued that there is no jurisdiction to make any award for the claimant unless compensation be actually payable ; or, at all events, that if it is not yet payable the application must be dismissed as premature.

I cannot read the Act in the sense contended for by the respondents. Its effect is that if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject to the provisions of the Act, be liable to pay compensation in accordance with the first schedule. (Sect. 1, sub-s. 1, of the Act.) The employer is not to be liable unless there is disability to earn full wages for at least one week. (Sect. 1, sub-s. 2 (a).) The first schedule (para. 1 (b)) regulates the amount of payment to be made where total or partial incapacity for work results from the injury. Sect. 1, sub-s. 3, of the Act provides for the settlement by arbitration of any question arising in any proceedings under the Act as to the liability to pay compensation. It was urged that no such question could arise unless it is alleged that a present liability to pay has accrued, and that unless this be proved the application fails altogether. I cannot put any such construction upon the words of sub-s. 3 of the first section. The words of the sub-section are apt to cover the case of a present injury falling within the Act which will probably lead to incapacity for work in the future. It is highly desirable that the facts as to the accident should be ascertained at the earliest possible date, and I can find in the words of the Act no support for the argument of the respondents that there is no power to adjudicate on this point unless incapacity has accrued giving a present right to compensation. It has been not uncommon to make what are called "suspensory awards" in such cases, awarding a nominal sum per week by way of keeping the proceedings alive until the time comes when it can be determined whether incapacity for work will be the result. I think that it is much better that the finding as to the accident

should be followed by a postponement of the determination of the question of a right to compensation until events have shown whether the accident has produced incapacity. Such a course was recommended so long ago as 1899 by Vaughan Williams L.J. in the case of *Chandler v. Smith*. (1) It was adopted in the present case. I think that the form of the award should be altered as has been proposed from the Woolsack, but in substance such an order will restore the award made by the arbitrator. It was admitted on behalf of the respondents that a suspensory award could be made on application for review under the sixteenth paragraph of the first Schedule, but it was contended that this was incompetent on an original application. I can find nothing in the words of the Act to support this distinction. It would in practice be extremely inconvenient, as an early decision on the point whether the accident falls within the terms of the Act is most desirable. Of course no such consideration of convenience would justify disregarding any definite provisions of the Act laying down such a rule of practice. But there are no such provisions. On the contrary, the construction which the respondents desire your Lordships to adopt is, in my opinion, a very strained one, and involves the importation into the provisions of the Act for arbitration of a technicality which is not to be found there, and which would seriously embarrass the working of the Act in practice.

I agree that the further proceedings should be so postponed only where it is shown to the satisfaction of the arbitrator that there is a probability of the supervention of incapacity. In the present case I think the arbitrator was justified in finding that this was probable. A great many authorities were cited to your Lordships. The question, however, is a very simple one, and depends on the words of the Act. There is nothing in any of the cases cited which would conflict with the conclusion as to the meaning of its provisions at which I have arrived, and no useful purpose would be served by going through these authorities again in detail.

2. It was further contended on behalf of the respondents

(1) [1899] 2 Q. B. 506.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Viscount Finlay.

H. L. (E.) that the application should have been dismissed on the ground
 1919 that the claim had not been made within six months. This
 KING depends on the provisions of s. 2, sub-s. 1, of the Act, which,
 v. so far as material, are as follows: "Proceedings for the
 PORT recovery under this Act of compensation for an injury shall
 OF not be maintainable unless notice of the accident has been
 LONDON AUTHORITY. given as soon as practicable after the happening thereof
 Viscount Finlay. and before the workman has voluntarily left the employment
 in which he was injured, and unless the claim for compensation
 with respect to such accident has been made within six months
 from the occurrence of the accident causing the injury; or,
 in case of death, within six months from the time of death.
 Provided always that . . . (b) the failure to make a claim
 within the period above specified shall not be a bar to the
 maintenance of such proceedings if it is found that the failure
 was occasioned by mistake, absence from the United Kingdom,
 or other reasonable cause."

All that the arbitrator says on this point is: "With regard to the second contention, namely, that the claim was not made within six months, I think the circumstances disclosed in this case, which I need not elaborate, are such as to enable me to afford the relief which is provided by the second proviso to the second section of the statute. I think that proviso is applicable to this case." The proper course for the arbitrator would have been to set out the circumstances which in his opinion amounted to reasonable cause. In awards under this Act great care ought always to be taken to keep separate questions of fact and questions of law. I wish the arbitrator had been more specific in his findings. But I think that on the facts of this case the arbitrator was justified in finding that there was reasonable cause for not making the claim within six months, on the principle which was acted on by the Court of Appeal in *Luckie v. Merry*. (1)

The applicant was cross-examined on this point, as appears from the following extract from the transcript of the proceedings (pp. 5, 6): "Q. I want to know this. You say you felt pain from the time of the accident, and it affected

(1) [1915] 3 K. B. 83.

your sight, and it affected the sight not only of the right eye, but it also affected the sight of the left eye. A. Yes. Q. You knew that, I suppose, within a few weeks of the accident? A. Not within a month or so. Q. Did you think then it was a serious matter? A. I did. Q. Why, when you thought it was a serious matter, and your sight was affected in that way, why did you not make a claim for compensation on the Port Authority? A. They were treating me in a fair way in giving me light labour, and I did not see it was necessary to take compensation. Q. Your eye was getting worse and affecting the sight of the sound eye. Did you know about your right to compensation under the Workmen's Compensation Act if you met with an accident? A. No, I do not know that I did. Q. Did you know you had a right to be compensated if you met with an accident? A. Not while I was employed at doing labour. Q. You did not know you could make a claim while still employed? A. Yes, I did not know it. Q. Is that the reason why you did not make any claim? A. Yes. Q. The only reason is that you did not know you were entitled to make a claim whilst you remained in their employment? A. While I was receiving wages." Till February 21, 1917, the appellant was kept on by the respondents at his old wages, and one can quite understand his reluctance, under these circumstances, to engage in litigation with his employers. I cannot say that the course he took in not giving notice of claim was, under the circumstances, unreasonable. On the contrary, he might reasonably delay giving notice in view of the kind treatment he was receiving and his expectation that it would continue. The applicant's case on this point is not a very strong one, but I think it was open to the arbitrator, on the evidence to which he summarily refers, to find that there was reasonable cause within the meaning of the section, and I understand his award as so finding.

I am therefore of opinion that the decision of the Court of Appeal should be reversed, and that an award be made in the terms that have been proposed by the Lord Chancellor. The respondents should pay the appellant's costs here and below.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Viscount Finlay.

H. L. (E.) LORD ATKINSON (read by LORD SHAW OF DUNFERMLINE).
 1919 My Lords, I have on several occasions, particularly in delivering
 KING judgment in the cases of *Herbert v. Samuel Fox & Co.* (1)
 v. and *Hutchison v. M'Kinnon* (2), endeavoured to point out
 PORT that arbitrators in cases of this kind, whether they be county
 OF court judges or other, should make it clear on the face of
 LONDON their awards what are their rulings on pure questions of fact,
 AUTHORITY. what on questions of law, and what on mixed questions of
 law and fact, for the very sufficient reason that rulings of
 arbitrators on the two latter classes of cases are open to
 complete review by appellate tribunals, while the rulings
 on the first-mentioned class cannot be disturbed if there was
 evidence before those who made them upon which they might
 reasonably find as they have found. In my experience,
 now somewhat lengthy, I have never met with a case in which
 such a practice as that suggested has been so completely
 disregarded and departed from as in the present case. The
 result is that the difficulty one meets with is not to determine
 whether the learned county court judge decided rightly
 or wrongly on the points raised before him, but what he intended
 to decide, and what, if anything, he did decide. I take for
 example the question raised as to the making by the applicant
 of the claim for compensation. His claim was admittedly
 not made within the time fixed by s. 2, sub-s. 1, of the Work-
 men's Compensation Act of 1906, namely, six months from the
 date of the occurrence of the accident causing the injury.
 The point for decision was whether the failure to make it
 within this period was occasioned by "mistake, absence
 from the United Kingdom, or other reasonable cause."
 (Sect. 2, sub-s. 1, proviso (b).) It was resolutely contended
 before your Lordships that just as in an action for malicious
 prosecution the jury find the facts and the judge decides
 upon their finding the question of law, whether the
 prosecution was instituted with or without reasonable and
 probable cause, so here the learned county court judge,
 as the judge of fact, should have stated upon the face of his
 award his conclusions of fact touching the applicant's failure

(1) [1916] 1 A. C. 405.

(2) [1916] 1 A. C. 471.

to make his claim within the time specified, and as the judge of law, his ruling upon those conclusions as to the presence or absence of reasonable cause occasioning the failure. I am not sure that this contention is sound. At all events the learned county court judge in this case has not done either of these things. The only approach to an expression of opinion upon the question of the applicant's failure to make his claim in time is contained in the following ambiguous passage in his judgment: "With regard to the *second contention*, namely, that the claim was not made within six months, *I think the circumstances disclosed* in this case, which I need not elaborate, *are such as to enable me to afford* the relief which is provided by the *second proviso* to the second section of the statute. I think that *proviso is applicable* to this case." I suppose what the learned arbitrator, for that is his real character in this matter, meant to state in this passage was that the evidence in the case satisfied him that the applicant's failure to make his claim in time was occasioned by certain established facts or occurrences which in his opinion amounted to a reasonable cause, other than mistake or absence from the United Kingdom, within the meaning of s. 2, sub-s. 1, proviso (b). I so conjecture because mistake and absence from the United Kingdom were excluded by the evidence, though not at all by the language of the learned county court judge in the above-mentioned passage. He makes no formal finding at all. As it has not been contended that the learned judge's note of the evidence is not accurate, though certainly meagre, I think the applicant is in justice entitled to have that evidence considered by your Lordships and to have such a decision on this preliminary point pronounced by this House as your Lordships are of opinion should have been pronounced by the county court judge. In determining whether the cause occasioning the applicant's failure to observe the statutory time is reasonable or not, it is not irrelevant to consider what is the nature and function of the claim for compensation with which this section of the statute is concerned. No specific sum need be mentioned in it. It need not be expressed in any technical

H. L. (E.)

1919

KING

v.

PORT

OF

LONDON.

AUTHORITY.

Lord Atkinson

H. L. (E.) form of words. It need not be reduced to writing. It will
 1919 be sufficient if in some form of words it "makes it clear to
 KING the employers' mind that a claim for compensation under
 v. the Act is being made." See judgment of Cozens Hardy M.R.,
 PORT *Johnson v. Wootton*. (1) It is not the initial step in proceedings
 OF before any tribunal by which compensation is to be assessed.
 LONDON AUTHORITY. It is wholly different in its object from "the notice of the
 Lord Atkinson. accident," which gives to the employer detailed information
 on many points which it is essential he should possess in order
 to protect his interests. See s. 2. A speedy notice of that
 kind is vital, but it cannot be of any great importance in almost
 any case from the employer's point of view whether the claim
 for compensation be made within the period of six months
 from the happening of the accident or at a later period. And
 the function of the claim would appear to be to raise the
 question mentioned in s. 1, sub-s. 3, of the Act as to the
 employers' liability to pay compensation, which is the question
 which can, subsequently, be referred to arbitration. It is the
 initial step in the proceedings to raise and shape this question.
 Should the employer comply with the workman's claim, then,
 of course, there is no question, no dispute to be arbitrated
 upon. Should he dispute the claim, then the issue is knit,
 the question raised, the dispute called into existence. The
 claimant, however, is not bound to proceed at once to
 arbitration. If he should abstain from doing so for a length
 of time the employer can himself procure an arbitration
 to be held. The case of *Powell v. Main Colliery Co.* (2),
 together with the judgment of Romer L.J. (3), approved of
 in this House, establishes each of these propositions. Now
 what then is the nature of the reasonable cause other than
 mistake or absence from the United Kingdom, which excuses
 the workman from making the claim for compensation within
 six months from the date of the accident? Of course it is
 reasonable cause having reference to the workman himself.
 I think the cases of *Turnbull v. Vickers* (4), *Luckie v. Merry* (5)
 and *Abbott v. Biggleswade Joint Hospital Board* (6), establish

(1) (1911) 4 B. W. C. C. 258, 259.

(4) (1914) 7 B. W. C. C. 396.

(2) [1900] A. C. 366.

(5) (1915) 3 K. B. 83.

(3) [1900] 2 Q. B. 145, 157.

(6) (1915) 9 B. W. C. C. 107.

that, where all the facts of a particular case prove to the satisfaction of an arbitrator that a workman, to the knowledge of the employer or his agent, intends to seek compensation for an injury by accident sustained by him, and the employer or his agent says or does something calculated to lead the workman to form a belief, on which he acts, that, without making a claim, compensation will be given to him in the form of continuing him in his employment at his former wages, though he may not be able to do efficiently all his former work or suchlike, the arbitrator as a judge of both law and fact would be justified in holding that reasonable cause existed for the workman's omitting to make a claim formally within the six months.

Something very like this state of facts exists in the present case. The claimant was injured on December 18, 1915. He, on that day, reported to his foreman the fact of the accident having occurred, and then went to the hospital and got treated. The doctor wished to detain him and remove his right eye. At the time of the accident he could distinguish light from darkness by this eye. In a month or two afterwards he lost the sight of it completely. He again reported the accident to one of his employer's agents, W. Laken, on December 20. His eye getting worse he had an interview with the superintendent manager. Most unfortunately what took place between them is not stated at length in the judge's notes, as it should have been, but I think it is reasonable to conclude that the defendants or their servants were led to believe that the applicant would not be content to suffer under this serious injury without looking for compensation, and that they must have anticipated that he would make a claim for compensation unless something was done to satisfy him. In these circumstances the superintendent advised the claimant to get a lighter job with his employers. He got this lighter job at his old wages, and continued to work at it till March, when he went back to his old work. He continued at his old work at the old wages till February, 1917, when, having been examined medically on behalf of the sick club belonging to the Port of London Authority, he was dismissed.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord Atkinson.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord Atkinson.

My Lords, I think the rational conclusion to be drawn from this evidence is that the workman abstained from formally making a claim for compensation by reason of his being put into a light job at his old wages, thinking that this benefit was intentionally conferred upon him towards compensating him for the injury he had sustained, and leading him to believe that he would get compensation without a formal claim. If this be so, I think reasonable cause did exist for his omission to make his claim formally within the statutory period. In the applicant's particulars of claim dated July 12, 1917, he states that he was not suffering at the date thereof from any incapacity, and the amount of compensation claimed by him is 1*d.* per week, or alternatively a declaration that in the event of his hereafter being totally or partially incapacitated for work, or being unable to earn the same average weekly earnings as before the accident, he shall be entitled to compensation under the Workmen's Compensation Act, 1906. In the judgment of the learned county court judge I find the following passage: "I think therefore that if I am satisfied, following the words of the statute, that a personal injury by accident has arisen to the employee while in the employment and within the scope, etc., etc., of his employment, I am entitled to declare that the liability exists, not to order what comes under the suspensory provision, but I am entitled to say that there is a liability attaching to the employer though it may never fructify; that is to say, the employers may never be called upon to pay anything, but there is a liability arising from the accident which resulted in the injury to the man." And accordingly the first paragraph in his award runs as follows: "Having duly considered the matters submitted to me, I do hereby make my award as follows: I order that there be a declaration of the liability of the respondents to pay compensation to the applicant, should it hereafter be shown that he is unable to earn his full wages by reason of the accident, the subject-matter of this arbitration."

I presume the learned judge by this order means that he was of opinion that the applicant had sustained a personal

injury by accident arising out of and in the course of his employment ; but if so he ought to have formally found that this was so. That is the essential fact which must be proved to bring the case within the statute, and unless and until it is found the county court judge has, in my view, no jurisdiction whatever to make any order dealing either with present or future incapacity, total or partial. It does not appear to have been contested at the hearing that the applicant had met with such a personal injury, and possibly that fact accounts for the scanty nature of the note of the evidence touching the point ; but the strangest thing about this strange judgment is that the learned judge has not found specifically that, though the applicant was not suffering at the date of the arbitration from any incapacity, it was reasonably probable that partial or total incapacity might ensue as a result of the personal injury he has sustained. He seems to have thought that an applicant is entitled to what is styled a "suspensory order" for the asking of it, without any proof whatever that future incapacity may probably ensue.

In my opinion that view is wholly erroneous. If no present incapacity be proved, it is not to be assumed that future incapacity will ensue, but on the other hand, if the personal injury, though it does not produce present incapacity, so affects the workman's system that future incapacity will with reasonable probability ensue, then the taint thus given to the workman's system reasonably likely to cause incapacity in future is a matter for which the workman is, I think, entitled to be compensated quite as much as for any incapacity which is the immediate result of the injury. His bodily system is injured ; he is not the same man he was. The fact that some time must elapse before the results of that injury will develop themselves cannot defeat his right to compensation. The medical evidence shows, in my view, that future incapacity, partial or total, was a reasonably probable result of the personal injury by accident which the applicant has sustained. In order to do justice your Lordships are therefore, I think, entitled to make such an order as that evidence convinces you the county court judge should have made.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord Atkinson.

H. L. (E.) This case has been argued on behalf of the respondents as if this arbitration before the county court judge was similar to an action in which special damage actually sustained constitutes the gist of the action; such, for instance, as an action for the obstruction to a public highway where the plaintiff alleges he sustained damage different from that sustained by an ordinary member of the public, this particular loss constituting his cause of action. And it was contended that, no present incapacity having been proved, the applicant was not entitled to compensation, and the county court judge had no alternative but to dismiss his application.

1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord Atkinson.

I am by no means satisfied that this is a true analogy. Sect. 1, sub-s. 1, provides that the employer is liable to pay compensation where the workman has sustained an injury by accident arising out of and in the course of his employment. No doubt that sub-section also provides that the compensation is to be paid in accordance with the first Schedule to the Act. But in *Lysons v. Andrew Knowles & Sons* (1) Lord Halsbury said that this first provision was the affirmative and leading enactment, and if he came to the conclusion that there was no mode in the Schedule by which the quantum of compensation could be fixed, he should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which he thought would be quite within the powers of the Act, the compensation should be ascertained, because he did not look upon the provision made in respect of compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every workman to compensation, but merely regarded it as a mode of ascertaining what the quantum was to be. Lord Macnaghten expresses practically the same view pointing out that the right to compensation is given by the Act, but that the compensation is to be not "as defined by the Schedule," or "in the terms prescribed by the Schedule," but "in accordance with the Schedule"—words importing a certain latitude. Lord Davey con-

(1) [1901] A. C. 79, 85, 86, 92, 96.

curred with Lord Halsbury, and said he could not read the words "in accordance with the Schedule to this Act" as being restrictive of the obligation of the employer to pay compensation; that he should not consider that those words limited or restricted the right of the workman to receive compensation or the obligation upon the employer to pay compensation, but as intended to denote the manner and mode in which that compensation was to be carried into effect. I think, therefore, that the proposition so strenuously insisted upon, that, no existing incapacity being proved before the arbitrator, he had no alternative but to dismiss the applicant's claim, is thoroughly unsound. For this reason, that the workman may by the injury have been made a different man from what he was before it, quite as able no doubt for a time to work at his former work as efficiently as ever, but with a morbid tendency implanted in his system as a result of this injury which it is reasonably probable will develop incapacity to some extent at no distant date. The existence of that tendency, though latent for the time, is an injury for which s. 1 of the statute entitles the workman to be compensated, though the incapacity arising from it is at the time of the arbitration inchoate and undeveloped.

I am, therefore, quite unable to see upon what principle an order should not be made even at the original hearing framed in such a way as to allow the reasonably anticipated incapacity resulting from this morbid and hidden tendency time to develop itself. I do not think an answer is afforded by the argument that the workman, though he makes his claim, is not bound to proceed with the arbitration; that he can wait till the anticipated incapacity becomes actual incapacity and then proceed. The cases of *Griga v. Owners of Ship Harelda* (1) and *Green v. Cammell, Laird & Co.* (2) decided that it is as competent to make a suspensory order on an original application as it is to make it on an application to review. I thoroughly approve of both these decisions, and am therefore of opinion that in this case the order already suggested should be made and this appeal be allowed with costs.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord Atkinson.

(1) 3 B. W. C. C. 116.

(2) [1913] 3 K. B. 665.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.

LORD PARMOOR (read by LORD WRENBURY). My Lords, the appellant in this case is a workman who, for some time prior to December 18, 1915, was employed by the respondents as one of their permanent labourers. From early childhood his right eye had been practically useless, but he could distinguish light from darkness, and there was no disfigurement. On December 18, 1915, whilst the appellant was unloading the s.s. *Comery Castle* in the East India Dock a double-rope sling swung and struck him in the right eye. The accident was reported and entered in a book called "The Accident Report Book," but the appellant continued his usual work until January 11, 1916, when he was given a lighter job at the same wages. He worked at this lighter job until March 21, 1916, when he resumed his usual work, and performed the same without complaint or interruption until February, 1917. At this date the appellant applied for admission to the membership of a sick club, open to employees of the respondents, and was examined by the respondents' doctor. The respondents then learned of his defective eyesight for the first time, and he was discharged on February 21, 1917, not for any incompetence or inefficiency in his work, but because of the condition of his eyesight. No claim for compensation was made until February 28, 1917, upwards of fourteen months after the accident occurred. On July 12, 1917, arbitration proceedings were commenced in the City of London Court, and the learned judge, finding that the injury complained of was the result of an accident arising out of and in the course of the appellant's employment by the respondents, but that no incapacity had so far resulted, made an award with a declaration of liability against the respondents. This award was set aside in the Court of Appeal on the ground that no declaration of liability should have been made against the respondents as there was no evidence of any probable incapacity to the appellant in the future, as the result of the accident, and further, that the appellant's failure to make a claim for compensation within six months of the occurrence of the accident was not found to have been occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

The first question to determine is whether there was any evidence on which in reason the learned judge could find that there was reasonable probability of incapacity to the appellant in the future, as the result of the accident. The surgical evidence was given by the senior surgeon at Middlesex Hospital on behalf of the appellant and by the senior surgeon of the City of London Hospital on behalf of the respondents. They were in agreement that it might be necessary to remove the eye in future, and the witness for the respondents says : " The accident would aggravate the condition of the defect in the eye and precipitate, probably, the necessity of removal." It is clear, therefore, that there was evidence from which a conclusion might be drawn that the accident would probably precipitate in the future the removal of the appellant's eye. The further question arises whether in the result of such removal there is ground for the inference that the wage-earning power might be probably diminished. On this point the action of the respondents in dismissing the appellant is directly relevant ; but apart from this it is, in my opinion, impossible to say that there is no reasonable probability that the removal of an eye may affect the wage-earning power of the person injured. Whether in fact this result follows is a matter for subsequent inquiry, and the form of order which is proposed does nothing more than leave this question open for determination at some future date.

The second question before your Lordships is whether the learned judge exercised properly his judicial discretion in holding that the failure to make a claim within six months of the date of the accident was occasioned by reasonable cause, and consequently not a bar to claim. No doubt the relevant facts should be found by the learned judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute. There is no direct finding of the facts in the present case, but they never were in dispute, and it appears that the notice was delayed until the period of the dismissal of the appellant from his employment. I can see no reason why on these facts the learned judge might not have found

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord Parmoor.

H. L. (E.) in favour of the appellant, or that there is any reason for
 1919 interference with his discretion. A very similar question
 KING arose in the case of *Luckie v. Merry* (1), and I agree with the
 v. decision of the Master of the Rolls in that case. No general
 PORT principle is involved, nor can it be said that under all
 OF circumstances payment of wages will be a reasonable cause,
 AUTHORITY. but the Court is bound to look at the circumstances of the
 Lord Farmoor. relation between the man and his employer in the particular
 case under consideration.

A further question of general importance was argued in your Lordships' House. It was urged on behalf of the respondents that, where no incapacity has in fact arisen, no award can be made against an employer. It was argued that all the proceedings were coram non judice, and that the arbitrator had no jurisdiction. My Lords, I think that this contention cannot be maintained. A dispute had arisen in proceedings under the Workmen's Compensation Act, 1906, as to the liability to pay compensation under that Act, and when such a dispute has arisen the arbitrator has statutory jurisdiction under s. 1, sub-s. 3, and is bound to consider the matters brought before him. The dispute is the foundation of the jurisdiction of the arbitrator, provided that it is bona fide and not frivolous. If there had been no jurisdiction in the arbitrator it would have been competent for the appellant to take subsequent proceedings; but, on the other hand, if there is jurisdiction, the matter must be determined and decided, and it would be incompetent for either party to institute further arbitration proceedings. It is no objection to the jurisdiction of an arbitrator that the employer is not liable under the Act in respect of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed, but if an employer brings himself within this exemption at the hearing the decision must be given in his favour. For instance in the present case the appellant could not succeed unless, at the subsequent hearing, he could prove that he had been disabled for a period of at least one

(1) [1915] 3 K. B. 83.

week from earning full wages at the work at which he was employed. Sir John Simon in his argument on behalf of the respondents placed great weight on the authority of *Powell v. Main Colliery Co.* (1), in which it was held that "the claim for compensation" means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to the workman's employer. I do not think that this case has any relevance to the question of jurisdiction, or in any way affects the consideration of the statutory powers conferred upon the arbitrator.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
—
Lord Parmoor.

Assuming that it was within the jurisdiction of the arbitrator to entertain the claim I can see no reason why he should not have made an order of declaration of liability, or an order in the form proposed to be substituted by your Lordships. It has already been determined in this House (*Taylor v. London and North Western Ry. Co.* (2)) that the county court judge may make a suspensory order either by ordering that the weekly payment should be ended until further order or by reducing the weekly payment to a nominal amount, and the principle in this decision appears to me to apply to the present case, so soon as it has been determined that the arbitrator has jurisdiction to entertain the claim. I desire to add that, in my opinion, neither the schedule applicable to fixing the amount of compensation nor any rules made under the authority of the Act can be construed as cutting down the jurisdiction of an arbitrator to award compensation in any case which comes within the provisions of ss. 1 or 2 of the Act. The appeal should be allowed with costs.

LORD WRENBURY. My Lords, on December 18, 1915, this workman sustained personal injury by accident arising out of and in the course of his employment. On July 12, 1917, he made an application in the City of London Court for compensation, and to the sixth particular required by Form No. 1 to the Workmen's Compensation Rules—namely, "Particulars of incapacity for work, whether total or partial

(1) [1900] A. C. 366.

(2) [1912] A. C. 242.

H. L. (E.) and estimated duration of incapacity"—he answered "No
 1919 incapacity at present." The first and most important question
 KING upon this appeal is whether proceedings under the Act can
 v. be maintained when no present incapacity has resulted.
 PORT It is a question which can be answered only by a careful
 OF study of the provisions of the Act. The respondents contend
 LONDON that proceedings under the Act can be maintained only when
 AUTHORITY. four things are satisfied. There must, they say, be first an
 Lord Wrenbury accident arising out of and in the course of the employment.
 Secondly resultant personal injury; thirdly incapacity;
 and fourthly loss. The contention, I think, is well founded
 subject to the question whether incapacity includes latent
 incapacity and whether loss includes probable or contemplated
 loss.

The section of the Act which creates liability is s. 1. It provides that in an event the "employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." The provision of the First Schedule relevant to the present case is art. 1 (b), "where total or partial incapacity for work results." The word "where" means "in a case in which" or "if and when" incapacity results. The event need not happen contemporaneously with, although it must find its origin in, the accident. If incapacity does not supervene until six weeks or six months after the accident, the language of the enactment is satisfied and there is liability. But when can proceedings be instituted in respect of the liability, and what is the meaning of the word "proceedings" as used in the Act? To answer this question I turn to s. 1, sub-s. 3, of the Act. That sub-section speaks of a "question arising in any proceedings," and says that that question may be settled by arbitration. The "proceedings" therefore may be earlier in date than the arbitration. In other words, "proceedings" does not mean arbitration proceedings to the exclusion of anything that precedes them. The proceedings may be any "proceedings under this Act," for instance a notice or a claim under s. 2, sub-s. 1—steps which are to precede what the Act calls "proceedings for the recovery" of compensation. This

being premised, the exact question to be answered under this head is, I think, as to the meaning of s. 1, sub-s. 3. Am I to read the clause as if before the word "compensation" there were inserted the word "present" or "immediate" or as if there were inserted the words "present or future"? The words of the context are "If any question arises in any proceedings under this Act as to the liability to pay compensation." Does this include a question as to liability to pay future compensation in the sense of compensation in a future event, namely, incapacity arising in the future out of a present or past event, namely, the accident?

Before examining this further let me direct your Lordships' attention to another provision of the statute operative in another set of circumstances than those with which we have here to deal. Assume that the accident resulted in a present immediate incapacity and that an award was made fixing the compensation. That award may be reviewed under Sched. I., art. 16, and the weekly payment may be ended, diminished or increased. Inasmuch as it "may be ended" it follows that the arbitrator if he is not satisfied by evidence that it ought to be "ended" may refuse to end it, and may make an order in some form which will keep the liability alive and enable him, if subsequent results justify that course, to make a further order for a weekly payment adequate to meet the incapacity which has developed since the time when the former order was made. In such case the arbitrator can maintain his jurisdiction so as to deal with subsequent future developments of incapacity resulting from the accident. I apprehend that your Lordships would be reluctant so to construe the Act as to exclude a similar power where no incapacity is disclosed immediately or shortly after the accident, but there is evidence that incapacity may reasonably be anticipated to result in the future.

My Lords, after a careful study of the Act I have arrived at the conclusion that upon its true construction s. 1, sub-s. 3, is to be read as applying not exclusively to compensation presently payable, but to compensation for incapacity resulting from the accident, whether being an incapacity presently

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord Wrenbury.

H. L. (E.) existing or one which the arbitrator upon evidence before him finds, may probably result in the future. The respondents' contention is that the case is comparable to an action brought upon a bill which has not matured at the date of the writ or an action for rent not yet accrued due. If this is true it follows that if proceedings for arbitration were commenced before incapacity had supervened, and before the hearing incapacity had supervened, the arbitrator would be bound to dismiss the application. He would, according to the respondents' contention, have no jurisdiction. The Act did not, I think, intend any such lamentable result. There is a passage in Lord Halsbury's judgment in *Powell v. Main Colliery Co.* (1) very pertinent to this part of the case. He there points out that there is no technical phraseology to be found in the Act. The statute, he says, deliberately and designedly avoids it. There must be a dispute but "there is no technical phraseology by which the initiation of that dispute is pointed to." If the workman's case is that he has sustained an injury which upon medical evidence will, in all reasonable probability, result hereafter in, say epilepsy or fainting fits or the development of an internal injury whose exact nature is at present obscure, and the employer denies that this is so, there is I think a "question" within the Act; a question has arisen as to the liability to pay compensation and there is jurisdiction in the arbitrator to entertain it.

1919
KING
v.
PORT
OF
LONDON
AUTHORITY.
Lord Wrenbury

The respondents in support of their contention rely strongly on s. 1, sub-s. 2 (a), of the Act, which exonerates the employer from liability for an injury which does not disable the workman for a period of at least a week. There was no liability, they contend, at the outset, for non constat that disablement will continue for a week. If the workman applied, they say, on the day next after the accident he must fail, because at that date there was no liability. My Lords, I do not follow the argument. The most that can be said is that for a week it is not matter of certainty that there is liability. Further, the effect of s. 1, sub-s. 2 (a), is that there are some injuries

(1) [1900] A. C. 366, 372.

by accident to which the Act does not apply. Sect. 1 begins by saying that the employer shall be liable for injury arising from all accidents of a defined kind, but s. 1, sub-s. 2 (a), restricts those words by excluding certain accidents from their ambit. This leaves the construction of the Act as regards injuries which do fall within it unaffected.

My Lords, if this view be right the arbitrator in the present case had jurisdiction, but what order ought he to make? There was no incapacity at present. There could be no present order for payment of compensation. In such cases a practice has grown up principally (if not exclusively) in applications to review under Sched. I., art. 16, to take either one of two courses—namely, either (1.) to make an order for a nominal weekly payment of 1*d.* a week, or (2.) to make a declaration of liability and adjourn the question of compensation. My Lords, so many orders of 1*d.* a week have been made that your Lordships would hesitate, I think, to say that such an order is wrong, but I may say that I myself much prefer a form of order which does not award a nominal payment by way of compensation for a non-existent present incapacity but which recognizes the true facts and postpones the question of compensation until the time arises for awarding it. If I am right in thinking that in such a case as the present (assuming that there is evidence of incapacity to be reasonably anticipated in the future) there is a dispute from which there arises jurisdiction in the arbitrator, the following, I think, results. He can adjudicate upon the questions (1.) whether there has been an accident arising out of and in the course of the employment; (2.) whether the accident has resulted in personal injury; (3.) whether incapacity has resulted, or (if none has yet resulted) whether incapacity is upon the evidence reasonably to be anticipated as resultant in the future; and (4.) in the latter case he can direct the application to stand over with liberty to either party to apply to restore. The workman could restore the application if he was in possession of evidence that incapacity had supervened. The employer could restore it if he was prepared to show that all reasonable probability of resultant incapacity was past.

H. L. (E.)

1919

KING

v.

PORT

OF

LONDON

AUTHORITY.

Lord Wrenbury.

H. L. (E.) In the present case the evidence was, I think, sufficient to
 1919 justify such an order as I have indicated, and that was in
 KING substance though not in form the order which the county
 v. court judge made.
 PORT

OF
 LONDON
 AUTHORITY. There is another point in the case dependent upon the
 Lord Wrenbury dates. The accident was on December 18, 1915. The
 arbitration proceedings were commenced on July 12, 1917.
 This was long after the expiration of the six months mentioned
 in s. 2, sub-s. 1, of the Act. This in itself, however, is not
 material, for it was decided in this House in *Powell v. Main
 Colliery Co.* (1) that the "claim for compensation" mentioned
 in that section is not the initiation of arbitration proceedings
 but a notice of claim for compensation sent to the employer.
 No such notice of claim, however, was in this case sent within
 the six months, and the question is whether, within s. 2,
 sub-s. 1 (b), the failure to make a claim within the six months
 was occasioned by "reasonable cause." Upon this part
 of the case there is no finding of fact by the county court
 judge. He only states his conclusion in the words that
 "the circumstances disclosed . . . are such as to enable me
 to afford the relief" provided for by s. 2, sub-s. 1 (b). It is,
 however, the fact that the evidence is before your Lordships,
 and you are in a position to infer what the learned judge
 meant by "the circumstances disclosed." In my
 opinion they were sufficient to satisfy in law the words
 "reasonable cause." I say "in law" because the question
 whether the cause which existed in fact was reasonable or
 not is, I apprehend, matter of law. The decision in *Luckie
 v. Merry* (2), I think, was right.

My Lords, the result is that upon both points I think the
 appellants are right, and that the appeal should be allowed.
 But for the form of order made in the county court should,
 I think, be substituted an order to the effect approved by your
 Lordships.

*Order of the Court of Appeal reversed: And
 declare that the appellant has received an injury
 by accident arising out of and in the course*

(1) [1900] A. C. 366.

(2) [1915] 3 K. B. 83.

of his employment; but, inasmuch as the evidence has not established that, up to the date hereof, the appellant has, as a result of such injury, been incapacitated for work for any period, but has on the other hand established that there is a reasonable probability that such incapacity may ensue; order that the arbitration do stand adjourned, reserving to each of the parties thereto liberty to make such further application in the matter of the arbitration as he or they may be advised: The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House.

H. L. (E.)
1919
KING
v.
PORT
OF
LONDON
AUTHORITY.

—*Lords' Journals*, July 1, 1919.

Solicitor for the appellant: *R. Wilberforce Allen.*

Solicitor for the respondents: *Ernest Glenshaw.*

[HOUSE OF LORDS.]

M'ALINDEN (PAUPER) APPELLANT; H. L. (Sc.)*

AND

JAMES NIMMO AND COMPANY, LIMITED RESPONDENTS.

1919
July 1.

Workmen's Compensation—Review of Weekly Payment—Partial Incapacity—No Change in physical Condition—Inability to get Work—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., para. 16—Costs—Taxation—Pauper—Appeal to House of Lords—Scottish Appeal—Successful Pauper Appellant.

An application by an injured workman for a review of weekly payments may be entertained, notwithstanding that no change has occurred in the man's physical condition, if there is evidence that the difficulty of finding suitable work owing to the accident is greater than had been supposed at the time of the original award:—

Held, on the facts, that there was evidence upon which the arbitrator could competently increase the compensation.

Decision of the Second Division of the Court of Session in Scotland, 1918 S. C. 329 reversed.

The rule as to the taxation of the costs of a successful pauper appellant

* *Present*: VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD WRENBURY.

H. L. (Sc.)

1919

McALINDEN

v.

JAMES
NEMMO
AND
COMPANY,
LD.

in the House of Lords, whereby the fees of counsel are disallowed and the solicitor's costs are limited to costs out of pocket, with a reasonable allowance for office expenses, applies to Scottish appeals.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (1) upon a case stated by the Sheriff-Substitute of Lanark in an arbitration under the Workmen's Compensation Act, 1906.

The material facts, as shown by the case, were as follows : On June 24, 1915, the appellant, a miner, while in the employment of the respondents, sustained injury by accident arising out of and in the course of his employment by having three fingers of his right hand crushed between a hutch and the roof of the mine. The respondents admitted liability, and paid him compensation at the rate of 19s. per week up to November 4, 1915, and at the rate of 10s. 3d. per week from November 4, 1915, till January 29, 1916, when the compensation was stopped. On June 24, 1916, the appellant was examined by a doctor, who recommended an operation on the injured fingers, and on September 1, 1916, the operation was carried out. The arbitrator found that during the period from January 29, 1916, until June 24, 1916, the appellant was in the condition of being able for light work ; that from June 24, 1916, till October 15, 1916, he was unfit for any kind of work : and that from October 15, 1916, he had been able for light work, or such as a one-armed man might perform ; and on December 7, 1916, he awarded the appellant compensation at the rate of 10s. 3d. per week during the first period, at the rate of 19s. per week during the second period, and thereafter at the rate of 10s. 3d. per week.

On February 14, 1917, the appellant applied for a review of this award. He asked the Court, as from January 5, 1917, to increase the compensation payable under the award by such amount as to the Court might seem fit, in respect that since January 5, 1917, the respondents had refused or delayed to give the appellant suitable employment, and that, although he had endeavoured to obtain suitable employment in the district in which he was employed, he had failed to find

same owing to the condition of his right hand; and he gave particulars of several unsuccessful attempts to obtain employment.

H. L. (Sc.)
1919

McALINDEN
v.
JAMES
NIMMO
AND
COMPANY,
LD.

The case was heard and proof led on May 9, 1917. At the close of the proof the appellant's claim for review was restricted to the date of proof instead of January 5, 1917. The arbitrator found that there had been no change in the physical condition of the appellant (whose right thumb, ring and little fingers were normal), but that since the date of the award the appellant had made various applications to the respondents and to other employers for work such as could be done by him in his then condition.

After giving particulars of these applications (five in number) the arbitrator stated that none of them had been successful, for the reasons, either that there was no vacancy open at the time, that the condition of the appellant's hand prevented him being employed at heavy work, which he might have obtained at the Avenue Sand Works, or that a preference would be given, in the case of injured men, to men who had been injured in the works to which application was made; that it was not proved that the appellant had completely exhausted his chances of employment, or that it was impossible for men in his physical condition to obtain employment; that an offer was made by the respondents on the day on which proof was led to employ the appellant, but that it was not proved that the work proposed, which was of a temporary kind, was such as the appellant could perform.

The arbitrator found in law that the appellant was not entitled to the full measure of compensation as for total incapacity, but that, in view of the difficulty of his finding employment, which was attributable to the nature of his personal injury, he was entitled to an increase in the rate of compensation for partial incapacity formerly allowed. He therefore, on June 6, 1917, increased the weekly payment as from that date to the sum of 15s.

The question of law for the opinion of the Court was: Whether there was evidence upon which the arbitrator could

H. L. (Sc.) competently increase the appellant's compensation from
 1919 10s. 3d. per week to 15s. per week as from June 6, 1917.

M'ALINDEN The Second Division by a majority (Lord Dundas, Lord
 JAMES Salvesen, and Lord Guthrie; the Lord Justice-Clerk
 NIMMO dissenting) answered this question in the negative, and recalled
 AND the determination of the Sheriff-Substitute.
 COMPANY,
 LD.

Thomas Scanlan (with him *Macquisten* (of the Scottish Bar)) for the appellant.

The arbitrator was entitled to increase the compensation payable to the workman, on the principle of *Cardiff Corporation v. Hall* (1) and *Macdonald v. Wilsons and Clyde Coal Co.* (2)

Condie Sandeman K.C. (of the Scottish Bar) (with him *Harold W. Beveridge*) for the respondents.

On the facts of this case there was no evidence upon which the arbitrator could competently increase the compensation.

[He referred to *Sharman v. Holliday and Greenwood*. (3)]

VISCOUNT FINLAY. My Lords, in my opinion the right view of this case was taken by the Lord Justice-Clerk, and I observe that Lord Dundas, although he agreed with the majority of the Court of Appeal, and agreed in a sense contrary to the opinion of the Lord Justice-Clerk, said that he did so with very great hesitation. It appears to me that the amount may be reviewed if there has either been a change of circumstances, or if further events have put a different complexion on the case. The practical question here is whether the arbiter came to the conclusion, and whether there was evidence on which he could come to that conclusion, that the difficulty of finding work owing to the accident was greater than had been supposed at the time of the first award. In my opinion the judgment of the majority of the Second Division of the Court of Session goes rather to a consideration of the propriety of the conclusion and the weight of the evidence than to the point whether there was any evidence on which the arbiter might have come to that conclusion. It appears to me that these applications showed that there was a difficulty

(1) [1911] 1 K. B. 1009, 1019.

(2) [1912] A. C. 513.

(3) [1904] 1 K. B. 235.

in getting work owing to this accident. Of course, if there is a very great demand for labour, even comparatively inefficient labour, owing to the state of the market, a person injured may get employment, so that the state of the market may in that sense affect the demand for the labour, say, of a one-armed man. Then the fact that he is not employed in a different state of the labour market would be the result of the accident which partially disabled him.

H. L. (Sc.)
1919
M^CALINDEN
J.
JAMES
NIMMO
AND
COMPANY,
LD.
Viscount Finlay.

Under these circumstances it appears to me that the Lord Justice-Clerk was right in holding that there was evidence on which the arbiter might come to the conclusion which I infer he came to, and that his award ought to stand.

But I do not like to part with the case without saying that I think it is a great pity that the finding of fact was not more explicit. I do not know how often it has been said in this House that in these cases the findings of fact and findings of law ought to be kept separate; that there ought to be an explicit statement of what the facts found are, and what the arbiter intended to come to as a conclusion on the point of fact, and to keep the fact and the law separate. A good deal of discussion here has been in the endeavour to find out what it was that the arbiter regarded as being the facts and what he intended to decide. I have arrived at the best conclusion I can upon the materials before the House, and I think he intended to decide that subsequent events had shown that the difficulty of getting employment owing to the accident was greater than he had thought at the time of the first award, and that we cannot say that there was no evidence on which, in point of law, he might come to that conclusion.

VISCOUNT CAVE. My Lords, I am of the same opinion, and for the reasons given by the noble and learned Lord on the Woolsack. I am not sure whether upon the facts, as stated by the learned arbitrator, I should have arrived at the conclusion at which he arrived; but I am satisfied that there was evidence before him upon which he could base his conclusion, and therefore I agree with the opinion of the Lord Justice-Clerk and of the noble and learned Lord.

H. L. (Sc.) LORD DUNEDIN. My Lords, I concur. I agree entirely
1919 with the conclusion of the Lord Justice-Clerk.

M'ALINDEN

v.
JAMES
NIMMO
AND
COMPANY,
LD.

LORD SHAW OF DUNFERMLINE. My Lords, I am of the same opinion. I also agree with the opinion of the learned Lord Justice-Clerk. In a case of this kind I rather deprecate the citation of authority; but, on the other hand, there is so much analogy between the present case and the case of *Macdonald v. Wilsons and Clyde Coal Co.* (1), a case from Scotland, decided in the year 1912, that I will make so free, my Lords, as to cite from my own opinion the following sentences: "The appellant maintains that the circumstances are now different from those which existed when he agreed to accept 16s. 11d. per week, because he has entered the open labour market, and notwithstanding all his efforts, he is unable, on account of his injuries, to obtain any employment. He asks an opportunity of proving that his applications have been unsuccessful and that his want of success 'has not been due to the state of the labour market, but to his incapacity, and also to the very limited type of work which is now within his powers.'" My Lords, each case on fact differs from every other, but the circumstances of the present case are that a demand of a similar nature was made and that that demand in the opinion of the learned arbiter was satisfied.

My Lords, if by the expression "change of circumstances" were meant merely a change of circumstances in the condition of health or body owing to the accident, then there might be no such change whatsoever. But what is meant in language of that kind in cases like the present is that there has been more light thrown by the applicant upon the results of his injury and upon the effects on the labour market which the having of such an injury causes to him. That is a plain change, and a plain result may follow—namely, that the man who pronounced the original judgment as arbiter may find that the award does not fit the case with the additional light now thrown upon it by experience.

I do not detain your Lordships with any further

(1) [1912] A. C. 513, 518.

observations, except to say that, like your Lordship on the Woolsack, I read into what is *ex facie* a finding of law, a clear statement of fact to the following effect (I read it in terms): “The difficulty of his finding employment is attributable to the nature of his personal injury.”

My Lords, I observe the language of Lord Salvesen and the language of Lord Guthrie upon that topic, in which they seem to desiderate an express finding of fact to that effect. I agree with these learned Lords that it might have been better to have it, but to deny that it is there in substance and in truth seems to me to be erroneous. I think that error occurs in the judgment in the Court below, and it is here now to be remedied.

LORD WRENBURY. My Lords, I am of the same opinion. An application to review under art. 16, Sched. I., of the Act of Parliament is, I think, admissible not only where the circumstances have changed, but also where the party who applies to review is prepared to adduce evidence to show that the unaltered state of circumstances is now better understood than it was at the time when the first order was made. The question therefore to be resolved in this case—it is not easy to my mind—is whether there has been such a finding of fact as that I am in a position to say that, although the physical condition of the man remains the same, the arbiter was at the second arbitration in a better position to judge of the diminution of capacity induced by the injury which the man had sustained. Upon that, difficult as it is, I concur with the Lord Justice-Clerk in that I am not prepared to say that there was no evidence upon which the arbiter could find that the greater difficulty in the appellant’s finding work (greater than contemplated when the 10s. 3d. was fixed) was due to the nature of his personal injury. If there was such evidence, it was for the arbiter to determine what the result of it was, and this appeal must succeed. I therefore think the appeal should be allowed.

The question of costs was then argued.

Macquisten (of the Scottish Bar) (*T. Scanlan* with him) for the appellant.

H. L. (Sc.)
1919
M^cALINDEN
v.
JAMES
NIMMO
AND
COMPANY,
LD.

Lord Shaw of
Dunfermline.

H. L. (Sc.) The appellant asks for the costs which an ordinary litigant
 1919 would get, according to the law and practice of Scotland.
 M'ALINDEN In 1424, in the second Parliament of King James I. of Scotland,
 v.
 JAMES
 NIMMO
 AND
 COMPANY, be any pure creature, for faulte of cunning, or expenses,
 LD.
 —
 that cannot, nor may not follow his cause, the King, for the
 love of God, sall ordaine the Judge before quhom the cause
 suld be determined: to pur-wey and get a leill and a wise
 advocate, to follow sik pure creatures causes. And gif sik
 causes be obtained, the wranger sall assyith (1) baith the
 partie skaithed and the advocatis coastes and travel." The
 statute then proceeded to provide for the rigorous punishment
 of the judge if he refused to obey the Act, but that clause
 is now repealed by the Statute Law Revision (Scotland)
 Act, 1906. That is the foundation of the Scottish practice
 as to pauper costs. That practice is now regulated the
 Codifying Act of Sederunt, 1913, c. 10, cl. 16, which provides
 that "persons pursuing or defending in forma pauperis shall
 in the first instance be exempted from the payment of fees
 and professional charges to counsel and agents, and of Court
 fees; but where such persons are found entitled to expenses,
 such fees and professional charges, and Court fees, including
 all dues of extract issued or to be issued, shall be included
 in the account for expenses and decerned for." And see
 Calder v. Parker. (2) The English practice is entirely different.
 A pauper is entirely exempt, he never recovers, and the Court
 never recovers. That practice is founded upon 11 Hen. 7,
 c. 12, which, by s. 1, enacted that paupers might sue out
 writs without payment and that there should be assigned
 to them counsel and attorneys, who should take nothing
 for their services. That statute was amplified by 23 Hen. 8,
 c. 15, which provided that, though an unsuccessful pauper
 plaintiff could not be compelled to pay any costs, he might
 be punished at the discretion of the judge. The present rule

(1) "To Assyith, Assyith, Syith, sation, to satisfy." — Jamieson's
 Sithe, v.a. To make a compensa- Scottish Dictionary.

(2) (1841) 3 D. 477.

as to the costs of a successful pauper appellant in this House was settled in 1892 by *Johnson v. Lindsay & Co.* (1) It is there laid down that the fees of the House and the fees of counsel are to be disallowed, and that the solicitor is to have his costs out of pocket, with a reasonable allowance to cover office expenses. That was the first time that a pauper litigant had been refused his costs in this House, merely because he was a pauper. That rule was founded upon *Carson v. Pickersgill & Sons* (2), which is a very instructive case. At common law a practice had grown up, notwithstanding the statute, that if a pauper plaintiff recovered a substantial sum he was dispaupered, with the result that he was enabled to pay counsel and attorneys and recover the amount from the opposite side; but in *Dooly v. Great Northern Ry. Co.* (3) that practice was declared contrary to the law, and was put an end to. In the Court of Chancery, which was not bound by the statute of Hen. 7, an analogous practice had grown up, but it was disapproved of in *Carson v. Pickersgill & Sons* (2), and the English practice is now regulated by the rules of the Supreme Court. The Scottish practice and the Scottish law being so fundamentally different, it is submitted that a Scottish appellant coming to this Imperial Court is entitled to have the Scottish law administered. The rule in *Johnson v. Lindsay & Co.* (1) was laid down in an English appeal and was founded upon two English statutes, which are diametrically opposed to the Scottish statute. It is impossible to repeal the statute of James I. by a rule of practice which is in the teeth of it. In *Wyman v. Paterson* (4), which was a Scottish appeal, an application was made on behalf of the pauper appellant, by whose action a large trust fund had been recovered, that the fund should bear the costs of her solicitor; but Lord Halsbury said: "This is a pauper case. We do not give costs in a pauper case." In making that application no reference was made to the state of the law in Scotland, and it does not appear that this point has ever been considered by your Lordships' House. That, moreover,

H. L. (Sc.)
1919
M^cALINDEN
v.
JAMES
NIMMO
AND
COMPANY,
LD.
—

(1) [1892] A. C. 110.

(3) (1854) 4 E. & B. 341.

(2) (1885) 14 Q. B. D. 859.

(4) [1900] A. C. 271, 292.

H. L. (Sc.) was a somewhat different application, as the appellant was
 1919 not asking for costs against the other side. The statute of
 M'ALINDEN 1424 is a binding statute in the administration of the law of
 v. Scotland and, in so far as an order of this House, proceeding
 JAMES upon English statutes and English law and English decisions,
 NIMMO and conflicts with it, the statute prevails.
 COMPANY,
 LD.

Condie Sandeman K.C. (of the Scottish Bar) and *Harold W. Beveridge* for the respondents were not called upon.

VISCOUNT FINLAY. My Lords, in my opinion we cannot accede to this application. The practice in appeals to this House was settled in 1892, and ever since that time it has been adhered to, and adhered to in all Scotch cases. We are now asked to say that by virtue of a statute of 1424, a Scottish statute of James I. of Scotland, that practice is wrong.

Well, my Lords, that statute in its terms does not apply to the House of Lords; it is a statute applying to Scotland and to the Courts in Scotland, and the practice in Scotland is in conformity with the directions given for what the judge should do in cases where resort was had to the statute.

My Lords, the matter is not altogether devoid of direct authority, because in the case of *Wyman v. Paterson* (1) application was made, where a fund had been recovered, for an order that the fund which had been recovered and preserved by the action of the appellant, should bear the costs of her solicitor, and the Lord Chancellor, Lord Halsbury, said: "This is a pauper case. We do not give costs in a pauper case."

Under these circumstances, my Lords, it appears to me that we must adhere to the practice which has been established for so many years and which has received the sanction of Lord Halsbury's opinion, not as a mere dictum, but as the reason for the conclusion at which he arrived on that application.

For these reasons it appears to me that we cannot do anything in the direction desired by Mr. Macquisten on behalf of the appellant in the present case.

(1) [1900] A. C. 271, 292.

VISCOUNT CAVE. My Lords, I agree. I only desire to add that this House has power under s. 11 of the Appellate Jurisdiction Act, 1876, to regulate its own procedure. Under that power a rule has been laid down, and I think that it should be adhered to.

H. L. (Sc.)
1919
M'ALINDEN
v.
JAMES
NIMMO
AND
COMPANY,
LD.

LORD DUNEDIN. My Lords, I think the procedure of every Court is part of the *lex fori* of that Court. It is inconceivable that James I. of Scotland should have legislated for the forum of the House of Lords as it is now constituted. It is quite within the power of the House of Lords to make a regulation which would arrive at the result which Mr. Macquisten wants, but there is a good deal to be said upon both sides about the question whether a pauper should be allowed to get his expenses from the other side when he never can have to bear any expenses himself. It is a general question, the House of Lords has settled it in one way, and it is quite impossible, I think, for us to alter that practice.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the noble Viscount on my left, Viscount Cave.

LORD WRENBURY. My Lords, I agree.

Interlocutor of the Second Division of the Court of Session in Scotland reversed, and determination of the Sheriff-Substitute of Lanarkshire as arbitrator restored. The respondents to pay the costs both here and below, the costs in this House to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, July 1, 1919.

Agents for the appellant: Herbert Z. Deane, for Thomas Scanlan & Co., Glasgow, and R. D. C. M'Kechnie, Solicitor, Edinburgh.

Agents for the respondents: Beveridge & Co., for W. T. Craig, Glasgow, and W. B. Rankin & Nimmo, W.S., Edinburgh.

A. C. 1920.

3

E



[HOUSE OF LORDS.]

H. L. (Sc.)* HAMILTON APPELLANT;
 1919 AND
July 21. LORD ADVOCATE (ON BEHALF OF THE COM-
 MISSIONERS OF INLAND REVENUE) } RESPONDENT.

Revenue—Succession Duty—Rate of Duty—Entail—"Predecessor"—Succession, whether by Reason of a Disposition or by Devolution—Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2—Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 58, sub-ss. 1 and 4.

By the Succession Duty Act, 1853, s. 2, every disposition of property, by reason whereof any person becomes beneficially entitled to any property upon the death of any person, and every devolution by law of any beneficial interest in property upon the death of any person to any other person shall be deemed to confer on the person so entitled by reason of any such disposition or devolution a "succession"; and the term "predecessor" shall denote the settlor, disponent, testator, obligor, ancestor, or other person from whom the interest of the successor is derived.

The term "succession" is defined by the Act as denoting "any property chargeable with duty under this Act."

By the Finance (1909–10) Act, 1910, s. 58, sub-s. 1, the 5 per cent. rate of succession duty under the Succession Duty Act, 1853, is raised to 10 per cent.; but, by sub-s. 4, the section shall take effect, in the case of a succession under a disposition, only if the first succession under the disposition arises on or after April 30, 1909.

By a Scottish deed of entail of 1823 land was disposed to the settlor and the heirs of his body, whom failing to his cousin A., and the heirs male of his body, whom failing to the heirs female of his body.

A. succeeded, on the death of the settlor without issue, in 1829, and died in 1838, leaving a son, B., who succeeded him as heir male of his body. B. died in 1910 without heirs male, but leaving a daughter, the appellants, who succeeded him in the estate:—

Held, first, that, on the exhaustion of the heirs male of the body, the destination of the property was to a new class of heirs to be ascertained by reference to the deed of entail; and that, consequently, the appellants took the succession, not by devolution by law from her father, but by reason of the disposition of the original settlor, and was liable to succession duty on that footing.

Lord Advocate v. M'Culloch (1895) 22 R. 356 approved and followed.

Held, secondly, that the term "succession" in s. 58 of the Finance (1909–10) Act, 1910, bore the same meaning as in the Succession Duty

* *Present*: VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, and LORD SHAW OF DUNFERMLINE.

Act, 1853—namely, a succession in respect of which duty was chargeable; and, therefore, that the appellant's succession was the first succession under the disposition within the meaning of s. 58, and that the appellant was liable to succession duty at the rate of 10 per cent.

Decision of the First Division of the Court of Session in Scotland, 1918, S. C. 135 affirmed.

H. L. (Sc.)
1919
HAMILTON
v.
LORD
ADVOCATE.

APPEAL from a decision of the First Division of the Court of Session in Scotland, as the Court of Exchequer. (1)

The following statement of facts is taken from the opinion of Viscount Haldane: "By a disposition and deed of tailzie dated October 11, 1823, Hugh Hamilton disposed, inter alia, the estate of Pinmore in strict entail to himself and the heirs whatsoever of his body, whom failing, to Alexander West Hamilton (his cousin) and the heirs male of his body, whom failing, to the heirs female of the body of the said Alexander West Hamilton, and the heirs whatsoever of their bodies, with other destinations over on failure, the eldest heir female and the descendants of her body, always excluding heirs portioners, to succeed without division throughout the whole course of the female succession, and the daughter of the heir who was last in possession succeeding always in preference to the daughter of any former heir or other heir female, so often as the succession should devolve on daughters or heirs female throughout the whole course thereof, which he declared to be his true meaning and intention notwithstanding the aforesaid general destination to heirs whatsoever.

The entailor, Hugh Hamilton, died in 1829, leaving no heirs of his body, and thereupon Alexander West Hamilton succeeded, and died in 1838. His eldest son Hugh Hamilton (secundus) succeeded him as heir male of his body, and Hugh Hamilton (secundus) died in August, 1910, leaving no heir male of his body. He was succeeded in the entailed lands by his eldest daughter, who is the present appellant."

Two questions arose on this appeal. 1. Whether, under the terms of s. 2 of the Succession Duty Act, 1853, the appellant took her succession by devolution by law from her father or grandfather, in which case the rate of succession duty was 1 per cent. only, or by reason of the disposition of the original

(1) 1918 S. C. 135.

H. L. (SC.) settlor, in which case the rate of duty was 5 per cent., or, if
 1919 s. 58 of the Finance (1909-10) Act, 1910, applied, 10 per cent.
 HAMILTON 2. Whether, assuming that the appellant took by reason of
 v. the disposition, her succession was "the first succession under
 LORD the disposition" within sub-s. 4 of s. 58 of the Finance (1909-10)
 ADVOCATE. Act, 1910, in which case the appellant was liable for the
 increased rate of duty imposed by that section—namely,
 10 per cent.

The Lord Ordinary (Lord Cullen) held that the first question was concluded by *Lord Advocate v. M'Culloch* (1) and that the appellant took her succession by reason of the disposition of the settlor and not by devolution by law. On the second question he held that "succession" in s. 58 of the Act of 1910 meant the same thing as in the Act of 1853—namely, such a taking of property as made the property subject to duty; and that, therefore, the section applied to the appellant's succession, and that the appellant was liable for duty at 10 per cent., as claimed by the Crown.

The First Division (the Lord President, Lord Johnston, and Lord Mackenzie) agreed with the Lord Ordinary on both points.

1919. March 12, 13; June 30. *H. P. Macmillan K.C.* (with him *J. C. Pitman*) (both of the Scottish Bar) for the appellant.

The first question arises upon the construction of s. 2 of the Succession Duty Act, 1853. That question is whether the appellant took by reason of the disposition of the original settlor or by devolution by law from her father or grandfather. In the latter case she is the direct descendant of her predecessor and is liable to succession duty at the rate of 1 per cent. only. In the former case she is liable to succession duty as a collateral descendant at an increased rate. In other words, the question is whether the appellant's predecessor was the original settlor or her father or grandfather. Where upon the exhaustion of a particular line of descendants the succession is taken by a person specifically nominated by the settlor that person's predecessor in law is the original settlor because the

successor is ascertained solely by reference to the deed of settlement. On the other hand, where the person who succeeds cannot be ascertained by a mere reference to the settlement, but an invocation to the general law is necessitated in order to identify the successor, the succession is by devolution. The latter is the appellant's case. A mere divergence from the heirs male to the heirs female, being members of the same family, does not constitute a new stirps. The policy of the taxing statutes is that those in the direct line shall be lightly taxed but that collaterals and strangers shall pay heavily. The Legislature recognizes the ordinary ties of blood. If the appellant had been a son duty would have been payable at the rate of 1 per cent., but being a daughter it is said that it is payable at the rate of 10 per cent. That is an illogical result which the Court would shrink from adopting unless the statute clearly so directs. The Courts below, in deciding this point in favour of the Crown, were bound by the decision of the First Division in *Lord Advocate v. M'Culloch* (1) and this is really an appeal from that decision. [He also referred to *Lord Saltoun v. Advocate General* (2); *Lord Advocate v. Gordon* (3); *Earl of Zetland v. Lord Advocate* (4).] Assuming that the appellant takes under the disposition, the further question arises whether she is liable to duty at 5 per cent. or at 10 per cent. Sect. 58 of the Finance (1909-10) Act, 1910, raises the 5 per cent. rate of duty under the Succession Duty Act of 1853 to 10 per cent. but by sub-s. 4 enacts that this section shall take effect, in the case of a succession under a disposition, only if the first succession under the disposition arises on or after April 30, 1909. Here the first succession under the disposition was the succession of Alexander West Hamilton in 1829 and therefore the section does not apply. The Courts below have held that the appellant's succession was the first succession within the meaning of the section, on the ground that the first succession means the first dutiable succession, but there is no warrant for reading the word "succession" in any other than its natural sense.

(1) 22 R. 356.

(3) (1872) 10 M. 1015, 1022.

(2) (1860) 3 Macq. 659, 685.

(4) (1878) 3 App. Cas. 505; 5 R. (H. L.) 51.

H. L. (Sc.)

1919

HAMILTON

v.

LORD

ADVOCATE.

H. L. (Sc.) *Clyde L.A.* (with him *Morison S.-G.* for Scotland and
1919 *R. Candlish Henderson* (of the Scottish Bar)) for the respondent.

HAMILTON
v.
LORD
ADVOCATE.
The first prescribed line of heirs having been exhausted, the appellant has had to have recourse to a new prescribed line of successors. She therefore takes her succession under the disposition and not by devolution by law. In other words, when the succession under the entail passed, on the termination of heirs male, to heirs female, the heir female first succeeding started a fresh line of succession and took not by devolution by law but by reason of the disposition, and the appellant is liable to duty on that footing. [He was stopped.]

As to the second point, s. 58 of the Act of 1910 was obviously a direct amendment of the Act of 1853 and "succession" must be used in the sense in which it was used in the earlier Act; but in the Act of 1853 "succession" is defined as meaning "any property chargeable with duty under this Act." Before the appellant's succession there was no succession under the disposition on which duty was payable under the Act of 1853, for the succession of A. W. Hamilton was prior to the passing of that Act. The appellant's succession was therefore the first succession under the disposition within the meaning of s. 58 and she is liable to duty at the rate of 10 per cent.

H. P. Macmillan K.C. replied.

The House took time for consideration.

July 21. VISCOUNT FINLAY. My Lords, the first question in this case is whether the appellant, who succeeded to land in Ayrshire on the death of her father, Hugh Hamilton, took by devolution of law as his heiress, or whether she took under a disposition made by the deed of October 11, 1823. In the former case her father would be predecessor and the rate of duty would be 1 per cent.; in the latter case the predecessor would be Hugh Hamilton (primus), a brother of her great-grandfather, and the duty would be either 5 per cent. or 10 per cent., according to the construction to be put upon the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 58.

The deed of October 11, 1823, was made by Hugh Hamilton (primus), who died in 1829. By it certain lands were disposed to the settlor and the heirs of his body, whom failing to Alexander West Hamilton "and the heirs male of his body whom failing to the heirs female of the body of the said Alexander West Hamilton and the heirs whatsoever of their bodies" with further limitations. Provision was further made by the deed in the following terms: "The eldest heir female and the descendants of her body, always excluding heirs portioners, and succeeding without division throughout the whole course of the female succession, and the daughter of the heir who was last in possession succeeding always in preference to the daughter of any former heir or other heir female so often as the succession shall devolve upon daughters or heirs female through the whole course thereof, which I hereby declare to be my true meaning and intention notwithstanding the aforesaid general destination to heirs whatsoever."

H. L. (Sc.)
1919
HAMILTON
v.
LORD
ADVOCATE.
Viscount Finlay.

On the death of the settlor, Alexander West Hamilton succeeded to the lands, and on his death in 1838 he was succeeded by his son Hugh Hamilton (secundus), who died in 1910 without heirs male of his body, but leaving two daughters, of whom the appellant is the elder. The Crown claims duty on the footing that her predecessor for the purposes of succession duty was the settlor and that she took by his disposition. The appellant claims that, while Alexander West Hamilton, her paternal grandfather, took by disposition under the settlement, she took by devolution of law.

From the authorities referred to in argument I desire to cite only one passage which occurs in the judgment of Lord Selborne in the *Earl of Zetland v. Lord Advocate*. (1)

"The second section of the Act distinguishes between two classes of titles, viz., those in which the interest of the successor comes to him by 'disposition' (or, in the terms of English law, by purchase), and those in which it comes to him by 'devolution by law' (or, in English technical phrase as to real property, by descent). The predecessor,

(1) 3 App. Cas. 505, 519, 520.

H. L. (Sc.) in cases of 'disposition' (or purchase), is the 'settlor, dis-
 1919
 HAMILTON
 v.
 LORD
 ADVOCATE.
 Viscount Finlay.
 —

poner, testator, or obligor,' 'from whom the interest of the
 successor is derived;'—in cases of 'devolution by law'
 (or descent), he is the 'ancestor, from whom the interest
 of the successor is derived.' I omit the words, 'or other
 person,' which seem to have been put into the Act only
ex abundanti cautela. Devolution by law takes place when-
 ever the title is such that an heir takes under it by descent
 from an 'ancestor,' according to the rules of law applicable
 to the descent of heritable estates; and in all cases of descent
 the estate of the successor is immediately 'derived' from
 the 'ancestor' from whom the estate descends. The word
 'ancestor' does not mean, either etymologically or technically,
 a lineal ancestor only; in illustration of which proposition,
 I may refer to a passage in Comyns' Digest as to the English
 writ of 'Mort d'Ancestor'; which (it is said) 'does not lie
 upon the death of any ancestor, except a father, mother,
 brother, sister, uncle, aunt, nephew, or niece; for, upon the
 death of another ancestor, an aiel, besaiel, or cosinage, lies.' "

Under the deed of tailzie, on the failure of heirs male of the
 body of Alexander West Hamilton the property passed to
 the heirs female of his body, and the heirs of their bodies,
 subject to the provisions in favour of the eldest heir female
 and the daughter of the heir who was last in possession which
 I have already quoted. This establishes a new channel in
 which descent takes place in terms of the deed. The appellant
 therefore, as the eldest daughter, took by disposition and the
 settlor was her predecessor for the purposes of the Act. It
 follows that under the Act of 1853 the duty would be 5 per cent.

It remains to consider whether that duty is raised to 10
 per cent. by virtue of s. 58 of the Finance (1909-10) Act,
 1910. That section provides (sub-s. 1), that any succession
 duty which under the Succession Duty Act, 1853, is payable
 at the rate of 5 per cent., shall be payable at the rate of 10
 per cent. on the value of the succession, and further (sub-s. 4)
 that the section shall take effect in the case of succession
 arising under a disposition only if the first succession under
 the disposition arises on or after April 30, 1909.

The appellant contends that the succession is not the first succession under the disposition and that the succession duty as now claimed is therefore dutiable only at 5 per cent. It was contended on the other hand for the Crown that the first succession referred to in sub-s. 4 of s. 58 of the Act of 1910 must be a succession dutiable under the Act of 1853.

H. L. (Sc.)
1919
HAMILTON
v.
LORD
ADVOCATE.
Viscount Finlay.

My first impression was in favour of the contention of the appellant upon this point, but that impression has been modified by further consideration and I am of opinion that the contention on the part of the Crown is right. The Act of 1910 increased to 10 per cent. the duty payable at 5 per cent. under the Succession Duty Act, 1853, and the term "succession" is defined in the Act of 1853 as denoting any property chargeable with duty under the Act. I think that the term "succession" under sub-s. 4 of s. 58 of the Act of 1910 must be read in the same sense as referring to a succession dutiable under the Act of 1853. As any prior succession took place before the Act of 1853 became operative, it was not the first succession within the meaning of sub-s. 4.

Upon the whole I think that the appeal must be dismissed on both points with costs.

VISCOUNT HALDANE. I have come to the conclusion that the Crown is entitled to hold the judgment which it obtained from the Courts below. [His Lordship stated the facts and continued:] The first question in this case relates to the rate of succession duty payable by the appellant under the Succession Duty Act of 1853. She maintains that she took the succession through devolution by law from her father or grandfather, and that she was therefore, by reason of the provisions of s. 10 of the Act, liable to succession duty at the rate of only 1 per cent. The Crown, on the other hand, claims that she succeeded by virtue of the terms of the disposition by the original entailer to whom she was related as a collateral, and was therefore liable at the rate of 5 per cent. under that section, or possibly, in view of the change made by a later Act to be afterwards referred to, at the rate of 10 per cent.

My Lords, s. 2 of the Act of 1853 provides, so far as is material,

H. L. (Sc.) that "every past or future disposition of property....and
 1919 every devolution by law of any beneficial interest in property
 HAMILTON shall be deemed to....confer on the person entitled by
 v. reason of any such disposition or devolution a 'succession'
 LORD and the term 'predecessor' shall denote settlor, disponent,
 ADVOCATE. testator, obligor, ancestor, or other person from whom the
 Viscount interest of the successor is or shall be derived."

Now, it is well settled that, when the disposition has vested an estate in a person taking under it, and the succession of the next taker arises by the operation of a principle of law which alone ascertains the character in which he takes, his succession is deemed to be by way of devolution from the taker to whom he succeeds, and that taker is the predecessor within the meaning of s. 2. What the determining principle of law is, and what is the construction of the disposition, are matters belonging to the law applicable, which may be that of Scotland, or England, or of some other country. All that the Courts have laid down about a common rule of interpretation is really confined to the construction of the statute itself, on which they have intimated that a construction ought to be placed which will enable it to apply to an estate arising under whatever general system of law is being considered.

My Lords, in Scotland the law relating to estates in land is radically different from that of England. Here the fee simple can be split up into a series of minor estates in possession or remainder. If, for example, land is given to A. and the heirs of his body, with remainder to B. and the heirs of his body, and A. and the heirs of his body become extinct, B. takes a new estate tail, and the heirs of his body take by devolution from B. as their predecessor. But in Scotland, where the fee cannot be split up in this fashion, B. and the heirs of B.'s body take under an entail of an analogous description as heirs of provision to whom the fee passes in the order prescribed by the destination in the entail as the law interprets it. The law assumes as the principle of devolution the order prescribed by the entail, and treats that order as establishing a devolution by law in virtue of the provisions contained in it. When a person is named in the entail he need not, as in England,

be an heir by law or else a remainderman who can be the ancestor for a class of such heirs. He may be by the law of Scotland merely heir by provision under the entail. Now in *Lord Saltoun v. Advocate General* (1), as explained in Lord Blackburn's judgment in *Earl of Zetland v. Lord Advocate* (2), this was not questioned, but a construction was placed on the language of the Succession Duty Act which obviated divergence between cases in Scotland and England in the incidence of the duty. Under that construction where the entailer had disposed to her eldest son nominatim and the heirs of his body, whom failing to his nephew nominatim and the heirs of his body, the nephew was held liable as taking from the entailer as predecessor. It was obvious that if the entail had been of land in England he must have been so held liable, and a construction was put on the definition of "predecessor" in the Act of 1853 which excluded such a case as that of the Scottish destination before the Court from falling within "devolution" from an "ancestor" within the meaning of the words of the Act.

H. L. (Sc.)
1919
HAMILTON
v.
LORD
ADVOCATE.
Viscount
Haldane.

My Lords, I think that the result is that it is now established that when a person takes under a Scottish entail as the head of a new class of heirs, he takes, within the meaning of the Succession Duty Act of 1853, by disposition and not by devolution, while if he takes as an heir to be ascertained by law within a class which has been called or constituted by the act of the entailer he takes by devolution, and it makes no difference in the latter instance that he may have to serve himself as heir in order to establish his title.

Now, if this be so, how does the question stand on the destination before us? On the failure of the heirs male of the body of Alexander West Hamilton, which took place in the person of Hugh Hamilton (secundus), there is a destination to the heirs female of Alexander's body under which the appellant has come in. My Lords, I think that s. 2, on the construction to which I have referred as now settled, compels us to say that this destination to heirs female of Alexander's body is one to a new class which is to be ascertained by

(1) 3 Macq. 659.

(2) 3 App. Cas. 505.

H. L. (Sc.) reference to the disposition as the agency which created it.
 1919 No doubt when the class is ascertained the law does the rest
 HAMILTON by recognizing a devolution. But the ascertainment of the
 v. class is due to the disposition and to that alone. I therefore
 LORD find myself in agreement on this question with the learned
 ADVOCATE. judges who decided this case in the Court of Session, and also
 Viscount with those who decided *Lord Advocate v. M'Culloch*. (1)
 Baldane.

This, however, is not the only question which your Lordships have to dispose of. Sect. 58 of the Finance Act, 1910, provides that "any legacy or succession duty which under the Stamp Act, 1815, or the Succession Duty Act, 1853, or any other Act, is payable at the rate of 3 per cent. shall be payable at the rate of 5 per cent., and any legacy or succession duty which under the said Acts is payable at the rate of 5 per cent. or 6 per cent. shall be payable at the rate of 10 per cent. on the amount or value of the legacy or succession." Sub-s. 4 of the same section provides that the "section shall take effect in the case of legacy duty only where the testator by whose will the legacy is given or the intestate on whose death the legacy duty is payable, dies on or after the thirtieth day of April, nineteen hundred and nine, and, in the case of a succession arising through devolution by law, only where the succession arises on or after that date, and, in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date."

For the appellant it is contended that the succession of the appellant was not the first succession specified in accordance with the words as they stand of the taxing statute, inasmuch as Alexander West Hamilton was the first to succeed to the entail. But "succession" is defined by s. 1 of the Act of 1853 to denote any property chargeable with duty under that Act, and I think that the true inference from the language of sub-s. 4 of s. 58 is that the legislation refers to the same kind of succession as is referred to in the Act of 1853, that is, to such a taking under a disposition as makes the property subject to duty. I agree with the reasons given by Lord Cullen for adopting this interpretation.

My Lords, I am of opinion that the appeal fails and ought to be dismissed with costs. H. L. (SC.)

VISCOUNT CAVE. My Lords, I have arrived at the same conclusion on both points raised on this appeal.

On the first point, I am clearly of opinion that the appellant took by virtue of a disposition and not by devolution of law. The death of Hugh Hamilton (secundus) broke the chain of succession among the heirs male of the body of Alexander West Hamilton and opened the succession to a new class designated by the entail—namely, the heirs female of the body of Alexander West Hamilton, taking in the order specially indicated in the disposition and deed of tailzie of October 11, 1823. The appellant is the first member of this new class and takes by the disposition of the entail.

On the second point, I agree with the interpretation put by the Lord Ordinary upon s. 58 (4.) of the Finance (1909–10) Act, 1910, and with the reasoning upon which his conclusion is founded.

I think that the appeal should fail.

LORD DUNEDIN (read by Lord Shaw of Dunfermline). My Lords, the first point argued is admittedly ruled by the decision in *M'Culloch* (1), and the present case is really an appeal against that judgment. I cannot say I have felt any doubt as to that decision being sound. The truth is that the whole matter was settled long ago by this House in the case of *Lord Saltoun*. (2) What was wished was a working rule which should settle what should be done in the case of Scotch destinations, should settle who was “the predecessor in the sense of the Succession Duty Act.” The Court of Session had taken the very simple view that the predecessor was the person who last held the estate. There was much to be said for that view, but it did not commend itself to our predecessors under the guidance of Lord Chancellor Campbell, who thought that so to hold would make too much difference in the incidence of the tax in Scotland and in England.

The metaphysical conception of the estate taken by

(1) 22 R. 356.

(2) 3 Macq. 659.

1919
HAMILTON
v.
LORD
ADVOCATE.
Viscount
Haldane.

H. L. (Sc.) successive holders is radically different in English and Scottish
 1919 law, and the words of the statute cannot be directly applied
 HAMILTON in both countries to the same effect.

v.
 LORD Rejecting the view of the Court of Session it was necessary
 ADVOCATE. to find some other rule. That rule was formulated as follows :
 Lord Dunedin.

“ As long as the succession opened to one class of heirs called in a destination, succession was by devolution of law ; as soon as that class was exhausted and the original entail or settlement had to be invoked to designate what was the next class called, the succession was by disposition. In the first case the predecessor was the immediate preceding holder ; in the other it was the entailer or settlor.” Applying that rule, the heirs male of the body of Alexander West Hamilton being exhausted, it was necessary to go to the entail to find who were next called, to wit, the heirs female of his body, and in virtue of her belonging to the class the appellant succeeded. Accordingly the entailer is her predecessor.

As to the question of the rate of duty exigible, that is a question of pure chance. In the present case the appellant has to pay at the higher rate. In *M'Culloch's Case* (1) the successor had to pay at the lower. The appellant's counsel in this case seemed to think that there was an argument in the statement that if his client had been a male the duty would have been at the lower rate. The answer is a simple one that in that case his client would have been in the first class called. But it is equally true that if Mrs. Jameson M'Culloch had been a male the duty would have been at the higher rate instead of the lower. In the same way it is useless to say that if the destination had been simply to the heirs of the body of Alexander West Hamilton instead of to the heirs male of the body, whom failing to the heirs female of the body, then the appellant would have succeeded by devolution of law. The answer is that in that case the destination would have been a different one and in certain eventualities would have called different persons from the destination as it stands, for under the first supposed destination a female might have succeeded before a male. I am bound to say that, although

I have dealt with this question in my own words, I do not think I am adding anything to what was said by Lord President Robertson, afterwards Lord Robertson, in *M'Culloch's Case*. (1)

H. L. (Sc.)
1919
HAMILTON
v.
LORD
ADVOCATE.
Lord Dunedin.

As regards the second point, I agree with the learned judges of the First Division. The statute begins by altering the 5 per cent. duty to one of 10 per cent. Then comes the proviso, which says that the section shall take effect in the case of a succession arising under a disposition (which, the first point being decided as above, is the present case) only if the first succession under the disposition arises on or after the date of April 30, 1909.

Now it is evident that the duty of 10 per cent. cannot be exigible except from successions on which 5 per cent. was due, that is to say, from successions accruing after the date of the Succession Act, 1853. It seems to follow, unless the Act is to be made nonsensical, that when the proviso speaks of the first succession it is a succession of the same class—i.e., a succession arising after the Act of 1853. If that is so, the present succession is the first succession arising since the Act of 1853, and was after the date of 1909.

Agreeing as I do with the First Division on both points, I am of opinion that the appeal should be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, I am of the same opinion.

It is not necessary to restate the facts, which are well known, governing the decision. And I do not think that there is any doubt as to the law of this case. In the Pinmore entail, the entailer was succeeded by his cousin Alexander West Hamilton to whom in 1838 his son Hugh Hamilton (secundus) succeeded as heir of entail.

All that is relevant in the deed of entail are these words: "whom failing to Alexander West Hamilton . . . and the heirs male of his body, whom failing to the heirs female of the body of the said Alexander West Hamilton."

When Hugh Hamilton died in 1910 it turned out that he was the last of the heirs male of the body of Alexander West Hamilton, and accordingly that that line, prescribed by the

(1) 22 R. 356.

H. L. (SC.) entail, had come to an end. A further line had to be sought
 1919 for and it could only be sought for by referring to the deed
 HAMILTON of entail itself, and it was found in the words "whom failing
 v. to the heirs female of" Alexander West Hamilton. This is
 LORD the connection between the last taker, who was the last of
 ADVOCATE. the old line of heirs male, and the new and present taker—
 Lord Shaw of namely, the first taker of the new line of heirs female. I
 Dunfermline. entertain no doubt that in the construction of the Succession
 Act of 1853 and the taxation statutes which follow, the relation
 between these two persons was not a relation of devolution
 by law, but that the appellant takes not by virtue of any such
 relation, but by a fresh appeal to the deed of tailzie itself
 and under what is known under the statute as a disposition
 thereunder.

The appellant however maintains, for some reason which I
 have not been able to fathom, that no respect ought to be
 paid to the well-known decisions affecting this branch of the
 law and that the relation was that the succession is open to
 the present proprietor by devolution by law. My Lords,
 devolution by law does not mean devolution necessarily
 according to the order of intestate succession. As Lord
 President Inglis said in *Lord Zetland's Case* (1) in words
 expressly adopted by Lord Hatherley in this House (2):
 "The will of the entailer, when he calls a class of heirs-male
 of the body is, that the law shall determine within that class
 who is the person to take on every occasion on which a
 death occurs among the class, causing a devolution of the
 estate; and from this it seems to follow that on every such
 occasion the transmission of the estate from the dead to
 the living is a devolution by law."

But it equally follows that while devolution by law takes
 place within the class selected under the entail, it does not
 take place between one class and another class. This appears
 to me to be in entire accord with Lord Hatherley's language
 in the *Zetland Case* (3), where he interpreted the leading
 decision of *Lord Saltoun*. (4)

My Lords, it is here that I beg to express my distinct view

(1) (1876) 4 R. 199, 204.

(3) 3 App. Cas. 505, 511-515.

(2) 3 App. Cas. 505, 515.

(4) 3 Macq. 659.

that the judgment of the Court of Session in the case of *Lord Advocate v. M'Culloch* (1) was a correct decision. That too was a case of the exhaustion of the heirs male of the body and the taking of one of another class, i.e., from the line of heirs female. Lord President Robertson's words are very clear and in my humble judgment very sound. (2) "Mrs. Jameson M'Culloch," said he, "takes not because she is heir-male but on the contrary because there are no more heirs-male. Neither does she claim because it is a legal consequence of the destination of heirs-male that she should now take. On the contrary, she points to the deed of Edward, the entailor, which, now that the law has executed his commission to devolve the estate down the line of heirs-male, steps in and starts a fresh line of succession. To my thinking, the case is just the same as if the heirs-female now called had been the heirs-female of some stranger, who and whose heirs-male had never yet taken at all."

H. L. (SC.)

1919

HAMILTON

v.

LORD

ADVOCATE.

Lord Shaw of
Dunfermline.

My Lords, if that case be sound, the answer to the main question presented by the appellant admits of no doubt. I do not think that for taxing purposes the relation between successor and predecessor, that is, say, between the respondent as the first taker of the class of heirs female and the last of the line of heirs male, arose by devolution of law. It arose by disposition.

On the rate of duty I have nothing to add to what your Lordships have already declared.

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, July 21, 1919.

Agents for the appellant: *John Kennedy, W.S., for Shaw & Young, W.S., Ayr, and J. & F. Anderson, W.S., Edinburgh.*

Agents for the respondent: *H. Bertram Cox, Solicitor for England of the Board of Inland Revenue, for Sir Philip J. Hamilton-Grierson, Solicitor for Scotland of the Inland Board of Revenue, Edinburgh.*

(1) 22 R. 356.

(2) 22 R. 362.

[HOUSE OF LORDS.]

H. L. (Sc.)* STUBBS, LIMITED APPELLANTS ;
 1919 AND
 July 28. MAZURE RESPONDENT.

*Libel—Innuendo—Relevancy—Newspaper—Trade Publication—List of Decrees
 in Absence—Erroneous Entry—Imputation affecting Credit.*

In an action for libel brought by a tradesman in Scotland against the proprietors of Stubbs' Weekly Gazette, a commercial newspaper containing information as to the credit of traders, the defenders admitted that in a certain issue of the gazette the pursuer's name had erroneously appeared in the weekly list of persons against whom decrees in absence had been obtained in the Small-Debt Courts, the fact being that the claim had been settled out of Court. The list was headed by a note stating that in no case did the publication of the decree imply inability to pay on the part of any one named, or anything more than the fact that the entry published appeared in the Court Books. The pursuer averred by way of innuendo that the entry falsely and calumniously represented that the pursuer was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given :—

Held (by Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw of Dunfermline ; Lord Wrenbury dissenting) that, in the circumstances of its publication, the entry was capable of bearing the meaning attributed to it by the innuendo, and that the prefatory note afforded no defence to the action.

Stubbs, Ltd. v. Russell [1913] A. C. 386 distinguished.

Decision of the Second Division of the Court of Session in Scotland affirmed.

APPEAL from interlocutors of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord Dundas, Lord Salvesen and Lord Guthrie) and of the Lord Ordinary (Lord Anderson) in an action for libel brought by the respondent, a metal broker, against the appellants, the proprietors of Stubbs' Weekly Gazette.

The facts appear from the judgments of Viscount Finlay and Viscount Cave and are summarized in the head-note.

The alleged libel consisted of an entry which appeared in the appellants' gazette under the heading " Extracts from the

* *Present* : VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD WRENBURY.

Court Book of Decrees in Absence in the Small-Debt Courts." H. L. (Sc.)

The entry was in the following terms :—

Court.	Date.	Pursuers.	Defenders.	Amount in Decree.	1919 STUBBS, LD. v. MAZURE.
Dumbarton.	1916 Oct. 3.	E. Barrow, Glasgow.	S. Mazure, rag, rope, paper and metal merchant, 96, Church Street, Dumbarton.	12l. 11s.	

This entry was admittedly false.

The respondent averred by *Condescendence v.* that the entry was false and calumnious; that it falsely represented that a decree in absence had been pronounced against him for the sum of 12l. 11s., and that he was given to or had begun to refuse to make payment of his debts, and that he was not a person to whom credit should be given.

The appellants pleaded that the averments of the respondent were irrelevant. The Lord Ordinary repelled this plea and allowed a proof. The Second Division agreed that the action was relevant, but varied the interlocutor of the Lord Ordinary by allowing a proof before answer; and they refused leave to appeal to the House of Lords at that stage.

At the hearing the Lord Ordinary awarded the respondent 50l. and costs, and his decision was upheld by the Second Division.

The appellant appealed against all these interlocutors and against certain other consequential interlocutors.

July 8, 10. *T. B. Morison*, S.-G. for Scotland (with him *H. Cassie Holden*), for the appellants.

The innuendo in *Condescendence v.* is not warranted. The entry complained of relates to one particular debt only, and not to debts generally. The appellants rely upon the express statement in the introductory note that in no case does publication of the decree imply inability to pay on the part of any one named, or anything more than the fact that the entry published appeared in the Court Books. *Stubbs Ld. v. Russell* (1) is directly in point.

J. A. Christie (with him *E. O. Inglis*) (both of the Scottish Bar) for the respondent.

(1) [1913] A. C. 386; 1913 S. C. (H. L.) 14.

H. L. (Sc.) *Stubbs Ld. v. Russell* (1) is distinguishable. It was merely
 1919 a decision upon an innuendo of insolvency, and that was in
 STUBBS, LD. terms excluded by the introductory note. It has no appli-
 v. cation to less strong innuendos, such as the innuendo in the
 MAZURE. present case, and this is expressly recognised by Lord Shaw
 and by Lord Kinnear. The journal is sold as a guide as to
 credit, and if the introductory note says, "We give you nothing
 from which you can draw any inference," that is contradictory.
 If the proprietors make a false statement in their gazette they
 cannot evade the consequences by saying to their customers,
 "We do not draw any inference ourselves; we leave you to
 draw it." Lord Shaw's judgment clearly recognises that the
 entry of a trader's name in the gazette must have a detrimental
 effect on his credit. And see *Rarity v. Stubbs & Co.* (2);
Crabbe & Robertson v. Stubbs Ld. (3); *Searles v. Scarlett* (4);
Odgers on Libel and Slander, 5th. ed., pp. 32, 66. This entry
 is a slanderous imputation upon the respondent's credit, and
 that is the real point of this appeal, which in substance is an
 appeal as to relevancy; as to which see *Morrison v. Ritchie
 & Co.* (5)

T. B. Morison, S.-G. for Scotland, in reply.

This is a statement which is capable of an innocent inter-
 pretation. That being so, there must be some means by
 which the publisher may make it clear that he intends the
 words in an innocent sense: *Capital and Counties Bank v.
 Henty* (6) per Lord Selborne L.C. The appellants would
 have had no case if the statement were on its face defamatory,
 but where the statement requires an innuendo the intro-
 ductory note protects them.

[The following cases were also referred to: *Fleming v.
 Newton* (7); *Lionel Barber & Co. v. Deutsche Bank (Berlin)
 London Agency* (8); *Adam v. Ward* (9); *Wood v. Edinburgh
 Evening News Ld.* (10)]

- | | |
|----------------------------------|----------------------------------|
| (1) [1913] A. C. 386; 1913 S. C. | (5) (1902) 4 F. 645. |
| (H. L.) 14. | (6) (1882) 7 App. Cas. 741, 745. |
| (2) (1893) 1 S. L. T. 74. | (7) (1848) 1 H. L. C. 363. |
| (3) (1895) 22 R. 860. | (8) [1919] A. C. 304. |
| (4) [1892] 2 Q. B. 56, 59. | (9) [1917] A. C. 309. |
| (10) 1910 S. C. 895. | |

The House took time for consideration.

H.L. (Sc.)

1919

STUBBS, LD.

v.

MAZURE.

July 28. VISCOUNT FINLAY. My Lords, this is an action for libel, and it came before Lord Anderson twice. On the first occasion by his interlocutor of May 31, 1917, he repelled the defenders' plea in law of irrelevancy and allowed proof. On the second occasion after the proof had been taken, Lord Anderson by his interlocutor of January 18, 1918, sustained the pursuer's first plea in law that the pursuer having been slandered by the defenders was entitled to reparation, and assessed the damages at 50*l*. A reclaiming note was presented by Stubbs, LD., and the Second Division on July 20, 1918, dismissed the appeal with costs. This appeal to your Lordships' House asks that the interlocutor should be recalled on the ground that the pursuer's averments are not relevant.

I adopt the following statement of facts made by Lord Anderson on the first occasion on which the case came before him. "In this action the pursuer, who is a licensed broker carrying on business at Dumbarton, sues the defenders for damages in respect of defamation. On October 12, 1916, the defenders published, in their well-known Weekly Gazette, an entry to the effect that decree in absence for 12*l*. 11*s*. had been pronounced against the pursuer on October 3, 1916, in the Small-Debt Court at Dumbarton. That statement regarding the pursuer was false. No such decree was pronounced against the pursuer, and the Books of Court never contained any entry to the effect that any such decree had been pronounced. The pursuer pleads that the said publication by the defenders was not only false but also calumnious, and he alleges that the innuendo which the entry bears is 'that the pursuer was given to, or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given.' The pursuer further avers that he had always regularly met his obligations as they fell due. He states that, as a result of the publication of the said entry, he has suffered great damage in his credit and business, and he makes specific averments to substantiate this general allegation of injury."

H. L. (SC.) Stubbs' Gazette publishes extracts from the Court Books
 1919 of decrees granted in absence in the Small-Debt Courts, and
 STUBBS, LD. this action was brought in respect of a false allegation of such
 v. an entry with regard to the pursuer. The allegation com-
 MAZURE. plained of was that decree in absence for 12*l.* 11*s.* had passed
 Viscount Finlay. in the Small-Debt Court of Dumbarton against the pursuer
 Mazure, who carried on business at Dumbarton. Prefixed
 to the list in which this allegation occurs was the following :—

“ Extracts from the Court Books of Decrees in absence in
 the Small-Debt Courts.

“ *Note* :—The following extracts from the Court Books have
 been received since our last issue made up to the several
 dates given in the second column. It is probable that some
 of the decrees have been sisted, settled, or paid : and in no
 case does publication of the decree imply inability to pay on
 the part of anyone named, or anything more than the fact
 that the entry published appeared in the Court Books.”

Condescendence ii. made the following averments :—
 “ . . . The said Stubbs' Weekly Gazette has a wide circu-
 lation among the trading community and others through
 Scotland, and also in England and Ireland. It has a special
 portion devoted to the publication of the names and addresses
 of traders and others by and against whom decrees in absence
 have been taken. This is popularly known as and called
 the ‘ Black List,’ and any trader appearing in that list is
 looked upon with great suspicion as being a person to whom
 it is unsafe to give credit, as he will or may refuse or delay
 to make payments of his just debts. The object of the said
 list is to give information to tradesmen and the mercantile
 community generally as to persons against whom it has been
 necessary to take decrees in order to enforce payment of
 their debts.”

Condescendence iv. set out the passage in the Gazette
 complained of, and Condescendence v. made the following
 allegations :—

“ The said entry is of and concerning the pursuer, and is
 false and calumnious. It falsely represented that a decree
 in absence had been pronounced against the pursuer for the

sum of 12*l.* 11*s.*, and that the pursuer was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given. It was so understood by the public, and in particular by the pursuer's creditors and customers." No such decree in absence had, in fact, ever passed against the pursuer and the statement to that effect in *Stubbs' Gazette* was the result of a blunder on the part of the clerk employed to examine the lists.

H. L. (So.)
1919
STUBBS, LD.
v.
MAZURE.
Viscount Finlay.

It was contended by the Solicitor-General for Scotland on behalf of the appellant that the appeal must be allowed on the ground that the averments are not relevant and the decision of your Lordships' House in *Stubbs, Ld. v. Russell* (1) was pressed upon us. The facts and the allegations in that case were similar to those in the present case, with the very material exception that the innuendo was different, being that the pursuer was unable to pay his debts.

In my opinion the averments of the pursuer are relevant and were properly admitted to proof. In other words I think that the entry in the *Gazette* of which he complained and the allegations in the pleadings are such as to support the innuendo alleged, and Lord Anderson so found at the trial. There was evidence that the entry had been understood in this sense and that damage to the pursuer had been thereby caused. The object with which the list is published is that tradesmen and merchants may have material for forming a judgment whether credit may safely be allowed in any particular case. There was evidence that the list is known as the "Black List" and that the appearance of the name of any person in it is calculated to excite suspicion. The appellants relied on the Note prefixed to the entry in the *Gazette* to the effect that in no case does publication of the decree imply inability to pay on the part of any person named. But without imputing insolvency such a publication might suggest that the person named was a bad payer and that enquiry should be made before giving credit to him. If the entry is capable of being read in this defamatory sense, it is no answer

(1) [1913] A. C. 386; 1913 S. C. (H. L.) 14.

H.L. (Sc.) to an action for a false allegation that such an entry had
 1919 appeared in the Court Books, to say that it is stated in the
 STUBBS, LD. Note that the publication of the decree does not impute
 v. insolveny. It may be defamatory without imputing actual
 MAZURE. insolveny. There was evidence to support the pursuer's
 Viscount Finlay. averments, their sufficiency was a matter for the Lord Ordinary
 by whom the case was tried without a jury, and there is no
 ground for interfering with his conclusion or for treating the
 damages as excessive.

Very great pains were taken in the judgments in *Stubbs, Ld.*
v. Russell (1) to show that the decision was confined to the
 innuendo there alleged, namely, that the pursuer "was unable
 to pay his debts and was in insolvent circumstances and in
 pecuniary embarrassment and was avoiding payment of a
 just debt." The decision proceeded on the ground that
 such an imputation of insolveny was negatived by the Note.
 That Note was in the same terms as in the present case, but
 the innuendo is different. Lord Kinnear's judgment is
 rested on the ground that the imputation charged was one
 of insolveny, and that the Note in the publication complained
 of expressly stated that insolveny was not to be inferred.
 Lord Shaw of Dunfermline makes it quite clear that this was
 the ground, and the only ground, for the decision. (2) He says
 "For . . . such a decree might pass for a large variety of
 reasons, none of which would injuriously affect the reputation
 or trade of the debtor. One quite natural interpretation of
 the entry would be that the alleged debtor had forgotten
 to pay the small sum sued for. Another reason might be
 that he was—having certain opinions as to the injustice of
 the claim or the full amount of it—determined not to pay
 except under force of law. A third reason for such a decree
 might be that he was absent and knew nothing about the
 summons. And a fourth that he was a person given to refusing
 or delaying to pay his debts in ordinary and proper course.
 The last . . . might possibly affect the reputation and credit
 of the alleged debtor. And I am not prepared to say that

(1) [1913] A. C. 386; 1913 S. C.
 (H. L.) 14.

(2) [1913] A. C. 397; [1913] S. C.
 22.

there may not be circumstances in which injury, more particularly to a trader in humble and struggling circumstances, would not be produced if the erroneous entry had been taken up in the last-mentioned sense. Such a person might never have been in a Court, might always have met his obligations with regularity, might be in a critical stage in the development of his business, and, as at present advised, I should not say that it was a strained construction to put upon the entry that it was reasonably likely to imply that he was given to or had begun the practice of refusing or delaying to make payment of his debts and that the public or those dealing with him had understood it in that sense. The position taken up by the respondent, the pursuer in the action, is that he has put forward in issue the erroneous entry with a much more sweeping and serious innuendo. That innuendo is that the entry 'falsely and calumniously represented that the pursuer was unable to pay his debts.' He has, in short, taken upon himself the burden of saying that the entry of a decree in absence having passed against him for 9*l.* odd was equivalent to or implied an imputation of his insolvency. After much consideration, I am of opinion that this innuendo imports into the erroneous entry more than it can reasonably bear." The Lord Chancellor, Lord Haldane, expressed his concurrence with the judgments of Lord Kinneir and of Lord Shaw.

Lord Shaw's judgment seems to make it quite clear that the appellants' argument proceeds on a misunderstanding of *Stubbs, Ld. v. Russell*. (1) The innuendo charged in the present case is practically in the same terms as the innuendo suggested by Lord Shaw as being one which might be supported by the publication of such an entry. The contention of the Solicitor-General that Lord Shaw's observations must be considered as referring only to the case of a trader in humble and struggling circumstances appears to me to be quite untenable. Such a set of circumstances might render damage more likely to ensue from such a statement, but can have no bearing upon the question of relevancy.

I am, therefore, of opinion that the decision in *Stubbs, Ld.*

(1) [1913] A. C. 386.

H. L. (Sc.)
1919
STUBBS, LD.
v.
MAZURE.
Viscount Finlay

H. L. (SC.) v. *Russell* (1) has not the effect contended for by the appellants, and indeed a careful examination of the judgments shows that they are rather against than in favour of the appellants in the present case. It is one thing to impute insolvency; it is another thing altogether to say, as is said here, that the pursuer was given to or had begun to refuse or to delay to make payment of his debts, and the statement in the Note as to insolvency not being imputed by the publication of the entry does not rebut the possibility that the entry might be understood as importing a slighter degree of embarrassment, an imputation which might nevertheless prejudicially affect the trader. For these reasons, I am of opinion that this appeal should be dismissed with costs.

My Lords, I am informed that my noble and learned friend, Lord Dunedin, concurs in the judgment which I have just read.

VISCOUNT CAVE. My Lords, the appellants are the proprietors of a paper called "Stubbs' Weekly Gazette (Scotland)" in which they publish among other matters of interest to traders what purport to be "Extracts from the Court books of decrees granted in absence in the Small-Debt Courts." The Gazette of October 12, 1916, contained under the above heading an entry showing that a decree in absence for 12*l.* 11*s.* had been made in the Small-Debt Court at Dumbarton against the respondent. No such decree had in fact been made, and the statement was due to the carelessness of a clerk of the appellants, who had incorrectly abstracted the entries in the Book of Causes kept by the Sheriff-Clerk. Complaint having been made, the appellants published an apology, which was not accepted, and thereupon this suit was commenced.

In the condescendence of the pursuer (the respondent) certain statements are made which are material on this appeal. In Condescendence ii. he states as follows:—

"The defenders are the proprietors and publishers of the gazette known as Stubbs' Weekly Gazette. The defenders carry on for profit a business which they describe in their

advertisements and prospectuses as a means of enabling traders to avoid making bad debts, and they act as an agency for the recovery of over-due accounts, bills and rents, etc. The said Stubbs' Weekly Gazette has a wide circulation among the trading community and others through Scotland, and also in England and Ireland. It has a special portion devoted to the publication of the names and addresses of traders and others by and against whom decrees in absence have been taken. This is popularly known as and called the 'Black List,' and any trader appearing in that list is looked upon with great suspicion as being a person to whom it is unsafe to give credit, as he will or may refuse or delay to make payment of his just debts. The object of the said list is to give information to tradesmen and the mercantile community generally as to persons against whom it has been necessary to take decrees in order to enforce payment of their debts."

H. L. (Sc.)

1919

STUBBS, LD.

v.

MAZURE.

Viscount Cave

Then, after setting out the entry of which complaint is made *Condescendence v.* states as follows :—

"The said entry is of and concerning the pursuer, and is false and calumnious. It falsely represented that a decree in absence had been pronounced against the pursuer for the sum of 12*l.* 11*s.*, and that the pursuer was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given. It was so understood by the public, and in particular by the pursuer's creditors and customers."

Upon these statements the Lord Ordinary (Lord Anderson) allowed a proof; and the Second Division of the Court of Session, varying his decision, allowed a proof before answer. The suit was heard by the Lord Ordinary sitting without a jury, who found for the pursuer and awarded him 50*l.* as damages; and this decision was confirmed by the Second Division. Thereupon this appeal was brought against the interlocutors allowing proof as well as against the decisions at the hearing.

It was hardly denied before this House that the statement in the Gazette, if read in accordance with the innuendo in *Condescendence v.*, was defamatory; but it was argued on

H. L. (Sc.) 1919
 STUBBS, LD. v. MAZURE.
 Viscount Cave.

behalf of the appellants that the statement did not justify that innuendo. It may be that the statement taken by itself would not bear the meaning ascribed to it; but I think that when taken in conjunction with the circumstances alleged in *Condescendence ii.*, it is fully capable of bearing that meaning. Assuming, as for the purpose of considering whether proof should have been allowed we must assume, that the statements in that *Condescendence* are true, the result is that in a paper published as a means of enabling traders to avoid making bad debts, and in a special portion of that paper devoted to the publication of the names of traders against whom decrees in absence have been taken, such portion being popularly known as the "Black List," it was falsely stated that a decree for the small sum of 12*l.* 11*s.* had been obtained in absence against the respondent. It appears to me that such a statement made under such conditions is reasonably capable of bearing the meaning attributed to it in *Condescendence v.*; and I am confirmed in this view by the fact that, not only the pursuer's customers who were called as witnesses, but no less than five learned judges in the Courts below have found that meaning in it.

Reliance is placed by the appellants upon a headnote which is contained in the *Gazette* and which appears immediately under the heading "Extracts from the Court Books of Decrees in absence in the Small-Debt Courts." The material part of this headnote is as follows :—

"The following extracts from the Court Books have been received since our last issue made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled, or paid; and in no case does publication of the decree imply inability to pay on the part of anyone named, or anything more than the fact that the entry published appeared in the Court Books." The portion of the above headnote which is relied upon in the present case is the statement that in no case does publication of a decree imply anything more than the fact that the entry published appeared in the Court Books. If this means that readers of the *Gazette* are invited to rely upon the statement

that the entry has appeared in the Court Books as a true statement of fact and to draw all proper inferences from it, then the headnote does not assist the appellants. But if it means that readers are not to draw from the fact stated any inference prejudicial to the credit of the person named, then I do not think that serious reliance can be placed upon a warning so contradictory to the nature of the publication itself. The Gazette is published and circulated in order that its readers may draw inferences as to the credit of the traders named; and it appears to me to be futile to suggest that the publishers of such a Gazette are protected by a mere warning that no such inference is to be drawn. So to hold would be in effect to hold them immune from responsibility for their mistakes, however serious the consequences which may ensue.

H. L. (Sc.)
1919
STUBBS, LD.
v.
MAZURE.
Viscount Cave.

It is said that the case is concluded in favour of the appellants by the decision in *Stubbs, Ltd. v. Russell* (1), but in my view that case is clearly distinguishable from the present. In that case the entry and the headnote were indeed similar to those which are in question in this case, and the record included a statement of circumstances similar to those contained in *Condescendence ii.* as above set out. But in *Russell's Case* the pursuer, doubtless for good reasons, sought to attribute to the entry a different meaning, alleging that the statement "amounted to a false and calumnious representation that the pursuer was unable to pay his debts"; and the decision of the case in this House turned entirely on that innuendo. Of the two leading judgments that delivered by Lord Kinnear laid stress on the fact that the meaning ascribed by the innuendo to the false entry was in terms negatived by the headnote, which stated that in no case did publication of a decree imply inability to pay; the judgment of Lord Shaw, with which I respectfully agree, was to the effect that, quite apart from any argument to be drawn from the headnote, the entry in question would not, even with the special circumstances alleged, bear the particular meaning sought to be put upon it—namely, that it imputed total

(1) [1913] A. C. 386.

H. L. (Sc.) insolvency. His judgment did not exclude the possibility of
 1919 another interpretation prejudicial to the credit of the person
 STUBBS, LD. referred to, and was certainly not unfavourable to the view
 v. put forward by the pursuer in the present case. The decision
 MAZURE. in *Russell's Case* (1) is, therefore, not an authority for the
 Viscount Cave. appellants.

For the above reasons I am of opinion that proof was properly allowed. With regard to the hearing, I think it clear that the evidence, which has been read to your Lordships, contained ample material on which the Lord Ordinary could find for the pursuer. No question is raised as to the amount of damages. In my opinion the appeal fails and should be dismissed.

LORD SHAW OF DUNFERMLINE. My Lords, I agree. In my opinion, the case is not excluded by the decision in *Russell*. (1)

The case of *Russell* and the judgment delivered in this House have been most searchingly analysed in the Courts below. A formidable attack was made by the learned Solicitor-General for Scotland upon that analysis and in particular upon the very thorough and careful examination of *Russell's Case* by Lord Salvesen. This has made me, although unwilling in one sense to do anything but accept loyally the former decision of this House, re-examine the case of *Russell* and the position from the foundations. I think it right to confess to your Lordships that the result has been to confirm the judgment which I formed in regard to that case and to uphold the decisions of the Courts below in regard to it.

I trouble your Lordships only with these observations:—

It is apt to be forgotten that the necessity for a direct weighing up of the breadth and the significance of the issue presented in *Russell* arose from these circumstances. Undoubtedly there, as here, Messrs. Stubbs' newspapers contained an erroneous entry that a Decree in Absence against the pursuer had been passed. This was not the case, and the Sheriff Court Books did not contain such a record. But although that mistake had been made, yet the broad facts were that not very long before the erroneous entry appeared

(1) [1913] A. C. 386.

there were 9 or 10 other Decrees in Absence which had, in point of fact, been obtained against the pursuer. The innuendo, however, that was formulated was that the one erroneous insertion of an announcement that a Decree in Absence had been passed against the pursuer meant that the pursuer was unable to pay his debts, in other words meant his insolvency. It was held by the Court of Session that this issue should be allowed and accordingly that the defenders could not put forward a counter-issue containing any lesser allegation, as for instance that this pursuer was the same person who had figured so frequently in lists of Decrees in Absence, and that therefore he was a person who neglected or declined to pay his debts. The answer was made: He might be all that, and yet not be unable to pay his debts or insolvent: and unless you plead the *veritas* to all the breadth and gravity of that innuendo, the jury will be told that there is no true answer to the pursuer's case because it has not risen to the measure of the pursuer's case. This seemed to me like blocking the way to the real truth of the case and paving the way to an unjust result. But it was this very consideration which made *Russell's* case one in which it was most necessary to see whether a wide innuendo of inability to pay debts or of insolvency could be truly said to arise out of a single false allegation that a Decree in Absence had been passed against a debtor.

The learned judges in the Courts below were, I think, right in discerning in this circumstance the true significance of the decision in *Russell's Case*. (1) In the course of that case, if I may mention my own judgment, I thought it right to say that I could not see my way to exclude in all circumstances from responsibility the makers or circulators of a false accusation that a Decree in Absence had been passed against a tradesman. And I pointed out the responsibility which newspapers must accept which, in course of their business, circulate a false statement of that character. With regard to the procedure I indicated the more reasonable innuendo which has been in terms adopted in this case. I think it was rightly

(1) [1913] A. C. 336.

H. L. (Sc.)
1919
STUBBS, LD.
v.
MAZURE.
Lord Shaw of
Dunfermline.

H. L. (Sc.) adopted. And the careful judgment of the Lord Ordinary
 1919 seems to show that, under the principle, a reasonable case for
 STUBBS, LD. damages can be made out and a just and moderate result
 v.
 MAZURE. be reached. The judgments of both the Courts appear to
 Lord Shaw of me to be sound.
 Dunfermline.

My Lords, further reflection, however, inclines me to add one remark as to the Heading or Cautionary Notes placed by Messrs. Stubbs at the top of their lists of such decrees. I think that I must amplify one observation made in *Russell* (1) upon that subject. These notes, my Lords, are notes applicable to true statements and not to false statements. The assertion is made that the entry which has been advertised is an extract from the Court Books, that it is a publication of a decree, and that it represents neither insolvency nor anything else than the bare record. I do not think it is legitimate to apply any such cautionary preface to what was not a true but a false assertion, and the statement as to what a publication of the decree might imply seems to have no application to a case in which no such decree was granted. In short, unless this view be taken, very serious consequences might arise, and harm to business and reputation might result, when a newspaper is made, whether inadvertently or in the way of business, the vehicle for launching upon the public a false and calumnious statement. The limits of protection for both parties are found in the law itself; and it is not open to the author or circulator of a calumny to say to the public that they must take up a falsehood in one sense and no other, and by doing so to close the door to all remedy. A conditioned or specialised slander of that kind is not known to the law; the results of a calumnious falsehood arise from the impression which it—all of it, including reservations, cautions and all the rest—makes upon the minds of the readers, an impression which may be quite apart from any artificial restriction which the author of the falsehood sought to impose. It is for those results that the author or promulgator of the libel is responsible. The law itself is not inconsiderate of all the legitimate excuses for error in such publications, but it cannot accept the will of the

author of a wrong as the measure of the consequence of that wrong. H. L. (Sc.)

1919
STUBBS, LD.
v.
MAZURE.

LORD WRENBURY. My Lords, a large part of the matter which has been debated before your Lordships would have given me ground for serious consideration if *Stubbs, Ld. v. Russell* (1) had not been decided in this House. That case seems to me to affirm the proposition that the statement in the headnote in the Gazette that "in no case does publication of the decree imply inability to pay on the part of any one named" precludes an action for libel resting on the ground that it does involve such an implication. The proposition expressed in general terms seems to be as follows: If one makes and publishes as regards A. falsely but without express malice a statement that something is a fact which is not a fact and which if it were the fact would or might impute to A. something discreditable then if the writer by way of headnote or the like states that he does not make or ask the reader to imply from the fact stated the calumnious imputation he is not guilty of libel. Had I been a party to the decision in *Russell's Case* I fear that as in the present case I should have found myself in a minority of one. I should have thought that the question was what the reader would or might reasonably imply from the alleged fact even if the writer told him that he (the writer) did not imply and did not invite the reader to imply anything discreditable. But for the decision in *Russell's Case* I should have been of opinion with your Lordships in the present case.

The innuendo which the pursuer puts forward in the present case is "that the pursuer was given to or had begun to refuse or delay to make payment of his debts and that he was not a person to whom credit should be given." This divides itself into two parts which must be considered separately. The first is: "That the pursuer was given to or had begun to refuse or delay to make payments of his debts." I cannot see that this is calumnious unless you add such words as "because he was unable so to do" or "because he was insolvent."

(1) [1913] A. C. 386.

H. L. (Sc.) A man may refuse or delay to make payment of his debts
 1919 for a variety of reasons perfectly consistent with solvency
 STUBBS, LD. and honest intention, as for instance that he disputes the debt,
 v. or that he has overlooked it, or that he is absent from the
 MAZURE. country, or that he is so overwhelmed with engagements
 Lord Wrenbury. (say of a political nature) that no one need feel surprise. It
 may be, of course, because of inability to pay, but when
 there may be many reasons which are not discreditable what
 ground is there for selecting and attributing to the defender
 the imputation of one which is? I therefore do not regard
 the suggested innuendo without the addition of some such
 words as above suggested as being calumnious. Then if the
 suggested words are to be taken as added the innuendo
 becomes equivalent to that in *Stubbs, Ld. v. Russell* (1) and
 the decision in that case is directly in point. There is no
 libel because the entry read with the explanatory note is
 incapable of bearing the defamatory meaning ascribed to it.

The second part is "that he was not a person to whom
 credit should be given." This, I do not doubt, is calumnious.
 But how is it got out of the language of the publication unless
 it be confined to the same meaning as before? Upon this
 part of the case, argument was advanced before your Lord-
 ships that *Stubbs' Weekly Gazette* is regarded as being a
 sort of Black List and that to include the pursuer's name is
 equivalent to saying that he is on a Black List. I cannot
 adopt this contention. The heading of the Gazette shows
 that it contains amongst other things dissolution of partner-
 ships, applications for appointments of executors, new
 companies registered and registration under the Limited
 Partnership Act—matters to which no stigma can possibly
 attach. And as regards the particular matter with which
 your Lordships are concerned—namely, Decrees granted in
 Absence in the Small-Debts Courts—the headnote expressly
 states that publication of the decree does not imply inability
 to pay. To call the List under these circumstances a Black
 List seems to me to beg the question. It was contended,
 however, and the Lord Ordinary in this case accepted the

(1) [1913] A. C. 386.

contention, that, inasmuch as there was not in fact in the H. L. (Sc.) Court Books an entry such as the appellants stated was there 1919 contained, the explanatory note did not apply to it, for that it STUBBS, LD. applied only to published extracts from the Book. My Lords, MAZURE. this contention seems to me self-destructive. It involves the Lord Wrenbury. conception, first, that there is no such entry as is said to impute insolvency (in which case there is, of course, no libel) and, secondly, that there is such an entry but that it is not qualified and explained by the headnote.

Regard the case how you will, it is, in my judgment, covered by the principle of the decision in *Stubbs, Ld. v. Russell*. (1) The appeal, I think, should be allowed. Those who hereafter have to apply the two decisions of this House will look to find in your Lordships' judgment as just delivered the grounds upon which *Stubbs, Ld. v. Russell* (1) and *Stubbs, Ld. v. Mazure* are to be reconciled.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 28, 1919.

Agents for the appellants: *McKenna & Co., for Balfour & Manson, S.S.C., Edinburgh.*

Agents for the respondent: *Simmons & Simmons, for Manson & Turner Macfarlane, W.S., Edinburgh.*

(1) [1913] A. C. 386.

[HOUSE OF LORDS.]

H. L. (E.)* LONDON AND NORTH WESTERN RAIL- } APPELLANTS;
 1919 WAY COMPANY }
 July 29. AND
 J. P. ASHTON AND COMPANY RESPONDENTS.

Carrier—Carriage of Goods—Value and Nature of Goods not declared—Transit partly by Land and partly by Sea—Loss of Goods—Liability of Carrier—Onus of Proof—Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1.

Three packages of furs, each of which was above the value of 10*l.*, were delivered by the plaintiffs to the defendant railway company for carriage from London to Belfast. The plaintiffs made no declaration as to the nature and value of the goods, as required by s. 1 of the Carriers Act, 1830. The goods could not be traced beyond the defendants' London terminus, and there was no evidence as to when or where they were lost. The defendants relied upon s. 1 of the Carriers Act, 1830, as a defence to an action by the plaintiffs for the value of the goods:—

Held, that the Carriers Act did not protect the defendants, inasmuch as that Act afforded protection to the carrier only when the goods were lost by land, and the defendants had failed to show that the goods were lost during the land portion of the transit.

Decision of the Court of Appeal [1918] 2 K. B. 488 affirmed.

APPEAL from an order of the Court of Appeal (1), affirming an order of the Divisional Court (2) which affirmed a judgment of the judge of the Bloomsbury County Court.

In September, 1916, the respondents delivered to the appellants, the London and North Western Railway Co., at the receiving office in Knightrider Street, three parcels of furs for carriage from London to Belfast. Each of the parcels was above the value of 10*l.*, and no such declaration as is required by s. 1 of the Carriers Act, 1830, set out in the judgment of Viscount Finlay was made by the respondents.

The parcels were taken by the appellants from the receiving office to Euston station, but they could not be traced beyond the departure platform at that station. There was no evidence as to how, when or where the parcels were lost.

* *Present*: VISCOUNT FINLAY, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

(1) [1918] 2 K. B. 488.

(2) [1918] 1 K. B. 488.

In March, 1917, the respondents commenced an action in the county court against the appellants to recover 65*l.*, the value of the goods. The appellants set up s. 1 of the Carriers Act, 1830, as a defence to the action.

The county court judge held that the onus was on the appellants to prove that the loss of the goods occurred during the transit on land, and that as they had failed to discharge that onus they had not brought themselves within the protection of s. 1 of the Carriers Act, which applied only to common carriers by land.

This judgment was affirmed first by the Divisional Court (A. T. Lawrence and Shearman JJ.) and afterwards by the Court of Appeal (Pickford, Bankes and Scrutton L.JJ.).

The arguments on behalf of the appellants were the same as in the Court of Appeal and are fully reported in the report of the case before that Court.

The respondents' counsel were not called upon.

Disturnal K.C. and *Schiller K.C.* (with them *Russell Davies*) for the appellants.

MacKinnon K.C. and *S. A. Kyffin* for the respondents.

VISCOUNT FINLAY. My Lords, I do not think it is necessary to call upon counsel for the respondents.

In this case there were three parcels of furs delivered on three occasions by the respondents to the appellants, the London and North Western Railway Company, who carry goods between London and Belfast. The carriage of those goods is, of course, effected partly by land as far as Holyhead, and from Holyhead it is effected by sea as far, apparently in this case, as Greenore, and thence the goods, I suppose, go to Belfast by land. When the furs were delivered to the company, they would become liable on a contract to carry from London to Belfast, partly by land and partly by sea. The Carriers Act, s. 1, exempts a carrier from liability in certain cases, and s. 1 is very conveniently set out, omitting the immaterial words, on the second page of the appellant's case: "No common carrier by land for hire shall be liable for the loss of any furs contained in any

H. L. (E.)
1919
LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
J. P.
ASHTON
AND
COMPANY.

H. L. (E.)
 1919
 LONDON
 AND
 NORTH
 WESTERN
 RAILWAY
 COMPANY.
 v.
 J. P.
 ASHTON
 AND
 COMPANY.
 Viscount Finlay.

parcel or package which shall have been delivered to be carried for hire when the value of such articles contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office of such common carrier the value and nature of such articles shall have been declared by the person sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.” Then s. 2 makes provision for an increase of payment in respect of such articles.

Now the carriers, the London and North Western Railway Co., the appellants, claim the benefit of this section, and it is for those who plead the section to aver and prove that the section applies; and it does not apply unless the loss took place by land; it does not apply if the loss took place by sea. It is for the carriers, who, having entered into a general contract of carriage from London to Belfast, desire to get the benefit of the Act, to show that the facts bring them within that protection, and the facts do not bring them within that protection unless the loss took place by land.

It was said that there were two contracts. I cannot accept that view. The case of *Le Conteur v. London and South Western Ry. Co.* (1), which was relied upon, seems to me to show nothing of the kind. On the contrary, the Court there treated the contract as one contract but said that, being a contract for carriage, partly by land and partly by sea, the contract might be divisible as regards the extent of the liability by land as compared with the extent of the liability by sea.

This case, my Lords, has been before six judges already, and each of them has arrived at the same opinion. I desire to express my entire concurrence in the opinion which has been formed by every judge before whom this case has come, and I think the appeal must be dismissed.

LORD ATKINSON. My Lords, I concur. I think this case is perfectly plain. The first section of the Carriers Act is directed

(1) (1865) L. R. 1 Q. B. 54.

to protect carriers by land against being made liable for the loss of goods of a certain value, no declaration being made. That obviously means that it protects them when a loss is sustained while they are acting in that character. This necessitates its being proved by them that the loss occurred on the land portion of the journey, for it is only on the land portion of the journey that they are in the position of common carriers. If they want to protect themselves from liability they must prove that the loss occurred while they were acting in that character—namely, during the course of the land journey.

H. L. (E.)
1919
LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
J. P.
ASHTON
AND
COMPANY.
Lord Atkinson.

LORD SHAW OF DUNFERMLINE. My Lords, I concur.

LORD SUMNER. My Lords, I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 29, 1919.

Solicitor for the appellants : *M. C. Tait.*

Solicitors for the respondents : *Ballantyne, Clifford & Co.*

Applied. THE LOCH DEE. [1949]
1 All E.R. 522.

H. L. (Sc.)* WILLIAM ALEXANDER & SONS . . . APPELLANTS
1919
July 29. AND
AKTIESELSKABET DAMPSKIBET } RESPONDENTS.
HANSA AND OTHERS . . . }

Ship—Charterparty—Demurrage—Fixed Rate of Discharge provided Steamer can discharge at that Rate—Delay due to Shortage of Labour.

A ship was chartered to proceed to Archangel and load a cargo of timber and thereafter to proceed with the cargo to Ayr. The charterparty provided that the cargo was to be loaded and discharged at the rate of not less than 100 standards per day, whether berth available or not, "always provided the steamer can load and discharge at this rate," and that, in the event of the steamer being detained beyond the time stipulated as above for loading and discharging, demurrage should be paid at 70*l.* per day and pro rata for any part thereof. The ship duly arrived at Ayr, and if the discharge had been carried out at the stipulated rate it would have been completed in six and one-third days, but owing to a shortage of labour at the port it occupied thirteen and one-third days. The shipowner claimed seven days' demurrage:—

Held, (1.) that the general rule established by the authorities was that if the charterer had agreed to load or unload within a fixed period of time he was answerable for the non-performance of that agreement, whatever the nature of the impediments, unless they were covered by exceptions in the charterparty, or arose through the fault of the shipowner or those for whom he was responsible, and that this rule applied to a case where the time was to be ascertained by reference to the rate of discharge; (2.) (by Viscount Finlay, Viscount Cave, Lord Dunedin, and Lord Shaw of Dunfermline; Lord Wrenbury dissenting) that the proviso in the charterparty had reference to the structural capacity and equipment of the ship and did not apply to a shortage of labour.

Hansen v. Donaldson (1874) 1 R. 1066 explained and distinguished.

Dicta of Cozens-Hardy M.R. and Farwell L.J. in *Northfield Steamship Co. v. Compagnie L'Union des Gaz* [1912] 1 K. B. 434, 440, 441 approved.

Decision of the Second Division of the Court of Session in Scotland affirmed.

APPEAL from interlocutors of the Lord Ordinary (Lord Hunter) and of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lord Dundas, Lord Salvesen and Lord Guthrie).

* *Present*: VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, LORD SHAW OF DUNFERMLINE, and LORD WRENBURY.

The respondents were the owners of the steamship *Hansa*, H. L. (Sa.) and the appellants were the charterers of the ship under a charterparty which provided that the *Hansa* should proceed to Archangel and there load a cargo of wood and should thereafter proceed to Ayr and deliver the same.

The charterparty was in the printed form of the Chamber of Shipping White Sea Wood Charter to the United Kingdom, 1899. Clause 3 provided as follows:—

“The cargo to be loaded and discharged *at the rate of not less than 100 standards per day, counting from steamer’s arrival at the respective ports, and notice of readiness given in writing during business hours, and permission to load granted, whether berth available or not, always provided steamer can load and discharge at this rate,* with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 70*l.* per day and pro rata for any part thereof.”

The words in italics were type-written in the margin of the charterparty. The facts are fully stated in the judgment of Lord Finlay, and are summarized in the headnote. Upon the facts so stated the respondents claimed demurrage under the charterparty for seven days, 490*l.* The appellants relied upon the proviso in the marginal note in clause 3 as exempting them from liability.

The Lord Ordinary allowed the respondents’ claim, and the Second Division affirmed his decision.

1919. July 7, 8. *Condie Sandeman K.C.* and *Douglas Jamieson* (both of the Scottish Bar) for the appellants.

The judges of the Court of Session in holding that the appellants are liable for demurrage have applied the rule of law laid down by a series of decisions in the English Courts that where the time for discharge is fixed the charterer is liable for any delay beyond that period unless

1919
WILLIAM
ALEXANDER
& SONS
v.
AKTIESELS-
KABET
DAMPKIBET
HANSA.

H. L. (Sc.) 1919 such delay is attributable to the personal default of the ship-owner or those for whom he is responsible. See *Postlethwaite v. Freeland* (1); *Love and Stewart v. Rowtor Steamship Co.* (2); *Randall v. Lynch* (3); *Leer v. Yates* (4); *Thiis v. Byers* (5); *Straker v. Kidd & Co.* (6); *Budgett & Co. v. Binnington & Co.* (7) All those cases differ materially from the present case. *Budgett & Co. v. Binnington & Co.* (7), which is most like the present case in its facts, as the delay was there caused by a strike, is distinguishable because there the consignee was bound to bag the cargo in the hold before the ship delivered it; the first operation therefore was to be performed by the consignee, who was unable to fulfil his part of the contract. *Hansen v. Donaldson* (8), which is the leading Scottish authority on this point, governs this case, and shows that until the shipowner, not being prevented by any external or adventitious circumstance, is prepared to give delivery there can be no detention of the vessel in the sense of the charterparty. The doctrine of putting more and more risks on the consignee should not be extended to a case where the shipowner cannot discharge owing to scarcity of labour. But, assuming that in the first instance the appellants fall within the general rule of law, they are protected by the proviso in the marginal note, where the delay in the delivery is owing to shortage of labour. The words of the proviso are quite general: "Provided the steamer can discharge at this rate." The responsibility for placing the cargo on the quay rested with the ship whether the discharge was by the ship's crew or by outside labour, and, it being proved that the ship could not give delivery owing to shortage of labour, why should effect not be given to the plain words of the proviso? In *Northfield Steamship Co. v. Compagnie L'Union des Gaz* (9) Cozens-Hardy M.R., upon the construction of a similar proviso, said that it was concerned with the mechanical facilities of the steamer for delivery, and Farwell L.J. said that it referred to the structural capacity

(1) (1880) 5 App. Cas. 599.

(5) (1876) 1 Q. B. D. 244.

(2) [1916] 2 A. C. 527.

(6) (1878) 3 Q. B. D. 223.

(3) (1809) 2 Camp. 352.

(7) [1891] 1 Q. B. 35.

(4) (1811) 3 Taunt. 387.

(8) 1 R. 1066. .

(9) [1912] 1 K. B. 434, 440, 441.

and fittings of the vessel. Those dicta were not necessary to the decision of the case, which was a case of the ship being unable to secure a berth, and if they were intended to rule out shortage of labour it is submitted they are erroneous. There is no reason for limiting the words to the fitness of the ship's tackle and excluding manual labour. Reading the charterparty as a whole, there was no absolute obligation on the charterers to discharge at the stipulated rate but an obligation conditioned on the ship being able to deliver. The ship not being able to deliver the claim for demurrage fails.

F. D. MacKinnon K.C. (with him *J. Anderson Maclaren* of the Scottish Bar) for the respondents.

The cases fall under two heads: 1. When the charterer undertakes to discharge within a fixed time he guarantees the discharge within that time in the absence of personal default on the part of the shipowner. 2. When no time is fixed by the charter-party the charterer undertakes to do his best to effect the discharge. This case falls under the former head: "Discharge at a daily rate enables the number of lay days to be fixed as soon as the quantity of the cargo is known, and is equivalent to fixing the number of lay days beforehand": *Love and Stewart v. Rowtor Steamship Co.* (1) Here, as in that case, the original print was not for a discharge within a fixed time but for a discharge with customary steamship dispatch, etc., but those words may now be left out as being inconsistent with the added matter. The first part of the clause is equivalent to a provision that the cargo shall be discharged in six and one-third days. *Hansen v. Donaldson* (2) can only be reconciled with the current of authority if it be treated as a decision that there was personal default on the part of the shipowner in that he failed to supply shore labour. *Budgett & Co. v. Binnington & Co.* (3) is in point. The ingenious distinction relied on by Mr. Sandeman was not the basis of the decision. No point was made that in the joint operation there in question the first piece of work was to be done by the charterers. Apart from the special proviso

H. L. (Sc.)
1919
WILLIAM
ALEXANDER
& SONS
v.
AKTIESELS-
KABET
DAMPKIBET
HANSA.

(1) [1916] 2 A. C. 527.

(2) 1 R. 1066.

(3) [1891] 1 Q. B. 35, 39.

H. L. (Sc.) it is impossible to distinguish this case from that. There
 1919 the insufficiency of labour arose after the commencement
 WILLIAM of the discharge, and here it arose before, but there is no
 ALEXANDER distinction in principle between the two cases. Then as
 & SONS to the proviso, the meaning is, provided the ship is as a ship
 v. capable of discharging at the rate named. It does not refer
 AKTIESELS- to the circumstances existing at the port when she gets there.
 KABET The failure to get men owing to the shortage of labour is just
 DAMPSKIBET as much an extraneous circumstance as the failure to get a
 HANSA. berth, and for that the shipowner is not responsible. Both
 are matters beyond the control of the ship. The proviso
 may be paraphrased thus: "Provided the ship has the
 capacity to, and, but for circumstances for which the ship
 is not responsible, would have the power to, discharge," etc.
 On the appellants' construction the effect would be to turn
 this into a charter to load within a reasonable time. In
Hulthen v. Stewart & Co. (1) Lord Halsbury points out the
 difference between the two types of charterparty, and shows
 that in fixed time charters the charterer takes the risk of being
 able to discharge within the time.

Condie Sandeman K.C. replied.

The House took time for consideration.

July 29. VISCOUNT FINLAY. My Lords, this is a claim by shipowners for demurrage under a charterparty. The Lord Ordinary decided in favour of the pursuers (now respondents), and the Second Division affirmed his decision. The questions arising on this appeal from their affirmance are two: (1.) as to the general nature of the obligation imposed upon a charterer by a clause providing for discharge in a fixed number of days; and (2.) as to the meaning and effect of the words at the end of the marginal note in this charterparty: "Always provided steamer can load and discharge at this rate."

The appellants are the charterers and the respondents the owners of the steamship *Hansa*. By the charterparty

(1) [1903] A. C. 389, 390.

the vessel was to load at Archangel a cargo of timber and proceed with it to Ayr. The third clause in the charterparty so far as material is as follows: "*The cargo to be loaded and discharged at the rate of not less than 100 standards per day, counting from steamer's arrival at the respective ports, and notice of readiness given in writing during business hours, and permission to load granted, whether berth available or not, always provided that steamer can load and discharge at this rate. . . .*" The words in italics form the marginal note, and there is a provision in the charter that "should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 70*l.* per day and pro rata for any part thereof." If the discharge at Ayr had been carried out at the rate of 100 standards per day the time occupied would have been six and one-third days. Owing to a scarcity of labour at the port, the discharging, which began on November 17, was not completed until 6 P.M. on December 2. By the custom of the port the discharge was a joint operation. It was the duty of the shipowners to put the cargo on the quay and of the charterers to remove it thence. Both the shipowners and the charterers employed the same stevedore for this work, and, as he could not get enough men, delay took place alike as regards the placing of the cargo on the quay and its removal thence. The appellants, having been sued by the respondents for demurrage at the stipulated rate, urge that they are not liable, as the ship was not in a position to put the cargo on to the quay at the stipulated rate, owing to the same cause, scarcity of labour, which prevented the appellants from removing it. Lord Hunter, the Lord Ordinary, rejected this contention. He said: "It is well settled that where a merchant has undertaken to discharge a ship within a fixed number of days he is liable in demurrage for any delay of the ship beyond that period unless such delay is attributable to the fault of the shipowner or those for whom he is responsible. The risk of delay from causes for which neither of the contracting parties is responsible is with the merchant." The Second Division, consisting of the Lord Justice-Clerk, Lord Dundas,

H. L. (Sc.)
1919
WILLIAM
ALEXANDER
& SONS
v.
AKTIESELS-
KABET
DAMPSKIBET
HANSÅ.
Viscount Finlay.

H. L. (Sc.) Lord Salvesen and Lord Guthrie, were unanimously of the same opinion. Lord Dundas said that in view of the authorities, if Mr. Sandeman's appeal for the appellants was to succeed, it must be in the House of Lords.

1919
WILLIAM
ALEXANDER
& SONS
v.
AKTIESELS-
KABET
DAMPSKIBET
HANSÅ.
Viscount Finlay.

On this appeal a great many cases were cited laying down the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here, for certum est quod certum reddi potest), he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance the language used by Lord Justice Scrutton in his work upon Charterparties and Bills of Lading, art. 131. Of the authorities I will mention only *Budgett & Co. v. Binnington & Co.* (1), and I refer specially to the judgment in that case given by Lord Esher. Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect that I think it would be eminently undesirable to depart in a matter of business of this kind from the rule which has been so long applied, even if your Lordships felt any doubt as to the propriety of these decisions in the first instance. I myself have no doubt as to their correctness, and I understand that this is the opinion of all your Lordships. It seems to me that the appeal on this point must fail.

With regard to the construction of the concluding words of the marginal note, the motive of the charterers for desiring the insertion of these words is immaterial; the question is: what is the true meaning of the words themselves? As regards all mechanical facilities and appliances the steamer was equipped for delivery at the rate mentioned in the charterparty. It was owing to the shortage of labour that she was unable so to deliver. It was forcibly contended that it was for the ship to provide the labour as well as the appliances; that appliances without labour are of no use, and that it is

(1) [1891] 1 Q. B. 35.

a condition of the charterer's liability in terms of the marginal note that the steamship should be in a position to discharge at the stipulated rate, having men and appliances alike. I do not think that this meaning should be read into the words of this proviso. The Court of Appeal in the case of *Northfield Steamship Co. v. Compagnie L'Union des Gaz* (1) took the view that such words should be read as referring merely to the physical capacity of the ship for discharging, and that where the inability to discharge was due to want of labour without fault on the part of the shipowner or of his servants, the charterer would not be protected by such words. I think they were right. If it had been intended that mere liability on the part of the ship to find labour should excuse the charterer, much clearer words would have been employed. The terms used are not sufficient to work such a departure from the well-established rule that the charterer is excused from delivery in the stipulated fixed time only when he is prevented from doing his part by the default of the shipowner. He is not excused by the fact that the shipowner, as well as himself, was prevented, without any fault on his part, from doing his share of the work. I think that this appeal should be dismissed with costs.

My Lords, I am authorized to say that my noble and learned friend, Viscount Cave, concurs in the judgment I have just read.

LORD DUNEDIN (read by LORD ATKINSON). My Lords, the general question of the construction of a contract to load and discharge a vessel within a certain date is too well settled to be unsettled now. In the words of Mr. Bell, Principles, para. 432: "When lay-days and demurrage are stipulated, the shipper's obligation is absolute not to detain the ship beyond the days; and he will be liable for the demurrage . . . although occasioned by circumstances over which he has no control." The only real question in this case is as to the effect of the special clause. As to this I agree with the learned judges of the Court below. It is, I think, impossible to draw

H. L. (Sc.)

1919

WILLIAM
ALEXANDER
& SONS

v.

AKTIESELS-
KABET
DAMPSKIBET
HANSA.

Viscount Finlay.

(1) [1912] 1 K. B. 434.

H. L. (Sc.) a distinction between any of the various kinds of agencies
 1919 which are not within the control of the ship, any one of which
 WILLIAM may delay the loading or unloading. If, therefore, the clause
 ALEXANDER in question were given the most expanded meaning, it would
 & SONS certainly reverse the ordinary legal result of the stipulation
 v. as to lay-days. I agree with the Lord Justice-Clerk that if
 AKTIESELS- that was meant it would have to be effected by unambiguous
 KABET words. If, on the other hand, the clause is to have a restricted
 DAMPSKIBET meaning, then I agree that it must refer to some defect peculiar
 HANSA. to a ship as a ship. So construed it is not without its use,
 Lord Dunedin. for I do not agree with what Mr. Sandeman urged—namely,
 that if the clause were not there, and the ship's hatches were
 such that unloading within the days was not possible, the
 ship could not insist upon demurrage. In such a case I
 think the general rule would apply, the charterer having taken
 upon himself to guarantee the discharge within a certain
 number of days. Such a case is distinct from a case of actual
 fault on the part of the master hampering discharge. I should
 only, in conclusion, mention the case of *Hansen v. Donaldson* (1),
 upon which the appellants placed great reliance. I think
 that decision can be well supported but only in one view—
 namely, that the master was able to get extra assistance,
 and did not get it. Whether that was a true view of the
 facts matters not. The Lord Justice-Clerk in one passage
 shows, I think, that a case of the present sort was not in his
 view to be ruled by that decision. He says: "Until . . .
 the ship-master, not being prevented by an external or
 adventitious circumstance, was prepared to give delivery,
 there could be no detention of the vessel in the sense of the
 charterparty." Shortage of available labour is an external
 and adventitious circumstance. Lord Ormidale speaks of
 culpable delay on the part of the ship in putting out the
 cargo, and that this is the true view of the case seems to
 follow from the fact that both the Lord Justice-Clerk and
 Lord Ormidale accepted the general law as to the charter
 guaranteeing the unloading in a certain time as settled by
 the cases. I think the appeal should be dismissed.

(1) 1 R. 1066, 1070.

LORD SHAW OF DUNFERMLINE. My Lords, I concur. H. L. (Sc.)
 I am of opinion that the judgments of the Courts below are correct, and that the demurrage of 490*l.* is due. No question is raised in the appeal as to the calculations upon which this sum is reached. It is admitted that the lay-days were exceeded by seven, these lay-days being calculated in the proportion of 100 standards per day of the total cargo of 630 standards.

1919
 WILLIAM
 ALEXANDER
 & SONS
 v.
 AKTIESELS-
 KABET
 DAMPSKIBET
 HANSA.

The question in the case arises upon clause 3 of the charter-party and these words therein—i.e., “The cargo to be loaded and discharged at the rate of not less than 100 standards per day, counting from the steamer’s arrival at the respective ports, and notice of readiness given in writing during business hours, and permission to load granted, whether berth available or not, always provided the steamer can load and discharge at this rate.” It is admitted that notice of readiness to discharge was duly given by the ship on her arrival at Ayr on November 17, 1915. The reason in fact why the ship was not discharged within the lay-days is stated accurately in the examination of the witness Kenny, who was charged by both parties to make arrangements for the discharge of the ship: “Q. Did you get for the ship all the men that you could get? A. All that I could find round about; any old man who was knocking about I employed and put him on ship work.” In a later passage the same witness says: “The complaint then really was a fewness of men, shortage of labour. Apart from that I never heard anything said on the subject.”

My Lords, as applied to facts like these, the law is perfectly well settled. In *Randall v. Lynch* (1) Lord Ellenborough stated the position in law which has never been departed from: “I am of opinion that the person who hires a vessel detains her, if at the end of the stipulated time he does not restore her to the owner. He is responsible for all the various vicissitudes which may prevent him from doing so.” This proposition was repeated in ampler words by Lord Selborne in *Postlethwaite v. Freeland* (2): “There is no doubt that

(1) 2 Camp. 352, 355.

(2) 5 App. Cas. 599, 608.

H. L. (Sc.) 1919
 WILLIAM ALEXANDER & SONS
 v.
 AKTIESELSKABET DAMPSKIBET HANSA.
 Lord Shaw of Dunfermline.

the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charterparty, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated." This law has been applied over and over again, and is too well settled to be shaken.

The risk of vicissitudes which prevent the loading or discharge of cargo within the stipulated lay-days lies unconditionally with the charterer. This is the prescription of the general law. To avoid its application either (1.) the contract of parties must be absolutely clear; or (2.) it must be established that the failure of the charterer's duty arose from the fault of the shipowners or those for whom they are responsible.

The law of Scotland is identical with that of England on this topic. Mr. Bell is as clear as the English judges quoted when he says in his *Principles*: "When lay-days and demurrage are stipulated, the shipper's obligation is absolute not to detain the ship beyond the days; and he will be liable for the demurrage, or for the loss arising from further detention, although occasioned by circumstances over which he has no control." Recent cases in Scotland have followed this clear rule.

But the appellants found upon *Hansen v. Donaldson*. (1) I do not look upon that case as varying or invading the principle. In so far as it may be held to do so—and some of the language of the Lord Justice-Clerk (Moncreiff) is not very clear—the decision must, in my humble opinion, be reckoned a bad one. But in truth the decision was one upon fault, and to prevent a person from claiming damages or a remedy under contract in respect of circumstances which

(1) 1 R. 1066.

he himself has brought about is a principle of much wider application in law than in regard to shipping. Lord Ormidale, however, cleared up the point in his opinion, when, after quoting Mr. Bell as above, he comments as follows upon the passage (1): "He does not mean to say, and does not say, that the merchant or consignee is liable for the consequences of detention caused by fault on the part of the ship, or, in other words, by the culpable or undue delay of those in the charge of the ship in putting out the cargo."

H. L. (SC.)
1919
WILLIAM
ALEXANDER
& SONS
v.
AKTIESELS-
KABET
DAMPSKIBET
HANSÅ.
Lord Shaw of
Dunfermline.

It was on this latter ground that *Hansen* was decided. It is admitted in the present case that no fault attaches to the respondents. The responsibility for delay and consequent damage is accordingly with the appellants. It would have been with them under the general law supposing wind and weather had been such as to prevent discharge of cargo, and even under this special charterparty it is expressly provided that the unloading days have to count "whether berth available or not."

It is not disputed that the vessel was of a capacity and had equipment to enable the proviso to be complied with—namely, that the "steamer can load and discharge at this rate." A proviso of that description cannot be construed in a general sense so as to wipe out the well-known obligations and responsibilities which rest upon the charterer. The inability to discharge is an inability of the steamer in the more limited sense of a reference to the vessel itself, its equipment, or the like. And the meaning of the clause is that, suppose for instance the charterer was ready and able to discharge at 100 standards per day, but on account of the ship's defect or lack of equipment her maximum discharge could only be 50 standards a day, then, of course, in such a case the position of the ship is just the same in result as if by deliberate fault of those in charge of her the performance of the charterer of his obligations had been prevented. Construed in any broader sense, the proviso would wipe out the obligation, and this can never be allowed.

(1) 1 R. 1072.

H. L. (Sc.)
 1919
 WILLIAM
 ALEXANDER
 & SONS
 v.
 AKTIESELS-
 KABET
 DAMPSKIBET
 HANSA.

LORD WRENBURY. My Lords, this is the charterers' appeal from an interlocutor holding them liable for demurrage. There arise two points for decision: first, whether, if the charter had not contained the proviso presently stated, the charterers would have been liable; and, secondly, whether, if the first question be answered in the affirmative, the charterers are protected by the proviso "always provided steamer can load and discharge at that rate." The charter provides as follows: "The cargo to be loaded and discharged at the rate of not less than 100 standards per day with customary steamship despatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports," etc. For the moment, I stop there. The cargo was 630 standards, and by arithmetical computation, therefore, although not by definition of lay days in so many words, the charterers were entitled to six and one-third lay days. The action is for demurrage at per day in excess of that time. The vessel was detained for thirteen and one-third days. The cause of delay in discharge was shortage of labour at the port of discharge. The general rule is that the duty of providing sufficient means for the discharge of the cargo lies upon the charterer. The party who has contracted to unload within a specified time must bear the loss occasioned by any excess of time, although the delay is not occasioned by any default on his part. But this, of course, is subject to any provision to the contrary in the charter. In the absence of such a provision the charterer contracts not to do his best to deliver, but contracts to deliver. My Lords, in the charter, so far as I have quoted it, I find nothing to relieve the charterer from this contractual obligation. If the charter had not contained the proviso, I think the charterer would have been liable.

The second question is: whether he is relieved by the proviso? The words are: "always provided steamer can load and discharge at this rate." It was admitted by the pursuers that it was the duty of the ship to dump the cargo on the quay. The witness Steele, who was agent for the ship at Ayr, acting as he says "of course for the ship," endeavoured

to obtain, but failed to obtain, sufficient labour. When the ship had dumped the cargo on the quay it was the cargo owner's duty no doubt to keep the quay from being blocked with timber. There was no default by the cargo owner in that respect. The ship was never kept waiting on the shore gang. The timber was promptly removed whenever landed on the quay.

In these circumstances, the question is as to what is the meaning of the words "provided steamer can" discharge. The language is, of course, elliptical. It must refer not merely to the structural capacity of the steamer, e.g., that she has only certain hatchways and no more, but also to at least the mechanical appliances with which she is fitted, e.g., that she has only certain engines and of certain horse-power and no more. I see no reason why it should not refer also to the labour which is to work the mechanical appliances. Suppose the power were electric, but the motors were out of order. The steamer then, I conceive, cannot discharge. How does this differ from the case when the motors are in order but there is no man to pull a lever and start the power? Or suppose the power were steam but there was neither stoker nor engineer. For machinery is not machinery for any effective purpose unless it can be operated. Then does the case differ when the machinery can be worked but there is no manual labour to introduce the goods to the machinery and cause it to operate upon them and again to disengage the goods and set the machinery free to operate upon future goods? My Lords, all these are to my mind similar in kind. The steamer whose ability is the test must, I think, be a structure plus a control which will give life to that which without it is powerless and which will make it an apparatus capable for giving discharge. "Discharge" is a word which involves activity not mere passive existence. If the expression is to be thus understood, the contract is that the charterer will discharge at 100 standards a day, provided that the steamer is such as regards (a) her structure; (b) her engine and mechanical power; (c) such labour to utilize these mechanical appliances as it is for the steamer to supply, as that she "can

H. L. (Sc.)

1919

WILLIAM
ALEXANDER
& SONS
v.
AKTIESELS-
KABET
DAMPKIBET
HANSA.

Lord Wrenbury.

H. L. (Sc.) discharge" (i.e., as admitted, dump on the quay) 100 standards a day. This, I think, is the meaning of the proviso. The delay was caused by the deficiency of the labour above called (c). The proviso cast upon the ship the responsibility for this deficiency. The result is, in my opinion, that the proviso has relieved the charterers from a liability which would otherwise have rested upon them. For these reasons, I think that the appeal should be allowed.

1919
WILLIAM ALEXANDER & SONS
v.
AKTIESELSKABET DAMPSKIBET HANSA.
Lord Wrenbury.

Interlocutor of the Second Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, July 29, 1919.

Agents for the appellants: *Ince, Colt, Ince & Roscoe, for John W. and G. Lockhart, Solicitors, Ayr, and Dove, Lockhart & Smart, S.S.C., Edinburgh.*

Agents for the respondents: *Botterell & Roche, for Lucas, Hurry, Galbraith & Macpherson, Writers, Glasgow, and Macpherson & Mackay, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* WILSON AND ANOTHER APPELLANTS ;
1919
June 2. UNITED COUNTIES BANK, LIMITED, }
AND ANOTHER } RESPONDENTS.

Bankruptcy—Agreement by a Bank to supervise Business of trading Customer during Absence Abroad—Bankruptcy of Customer owing to Negligence of Bank—Action by Bankrupt and his Trustee for Breach of Agreement—Damages—Injury to Credit and Reputation—Personal Right of Bankrupt to Damages—Absence of special Damage—New Trial—Point of Law not taken at Trial.

In an action against a bank by a trading customer who had become bankrupt and his trustee in bankruptcy for damages for breach of contract, the jury found that the bank had agreed with the customer to

* *Present* : LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD ATKINSON, LORD PARMOOR, and LORD WRENBURY.

supervise the financial side of his business during his absence on military service and to take all reasonable steps to maintain his credit and reputation, and had by its negligence in the discharge of its duties under this agreement caused the bankruptcy of the customer; and they awarded the plaintiffs 45,000*l.* odd damages for the loss occasioned to the bankrupt's estate by the negligence of the bank, and 7500*l.* damages for the injury caused by that negligence to the bankrupt's credit and reputation:—

Held, that the right to claim damages for the injury to the bankrupt's credit and reputation did not pass to the trustee in bankruptcy, but remained in the bankrupt, and that, in the case of a trading customer, substantial damages were recoverable on this head of claim without proof of special damage; and, on the facts, that the damages were not excessive.

Rolin v. Steward (1854) 14 C. B. 595 applied.

Held also, on the facts, as to the damages for the loss occasioned to the bankrupt's estate (by Lord Birkenhead L.C., Lord Atkinson, and Lord Parmoor; Viscount Finlay and Lord Wrenbury dissenting), that, assuming that the damages were assessed upon a wrong basis, the bank was precluded by the course of the trial from demanding a new trial on this point.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal setting aside a verdict and judgment in favour of the plaintiffs (the appellants) and ordering a new trial. The action was brought by the appellants, Major R. S. Wilson and his trustee in bankruptcy, against the respondents, the United Counties Bank, *Ld.*, and Roper, the general manager, for damages for breach of contract. The action was tried before Bray J. and a special jury.^f

At the trial the jury found that the respondent Roper, as general manager of the respondent bank, had agreed on behalf of the respondents that Mr. Cremonini, the manager of the Bridgnorth branch, would generally supervise the business of the appellant Wilson and would see it carried on, and in particular the financial side of it, that the respondents would take all reasonable steps to maintain the appellant Wilson's credit, and that he could rely on the respondents to look after his financial affairs; and that they were guilty of negligence in performance of their duties; and the jury found damages in favour of the appellants, for the loss occasioned to the appellant Wilson's estate by the negligence of the respondents, 45,182*l.* 5*s.* 8*d.*, and, for the injury caused by that negligence

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
Ld.

H. L. (E.) 1919 to the personal reputation of the appellant Wilson, 7500*l.*, making together 52,682*l.* 5*s.* 8*d.*

WILSON v. UNITED COUNTRIES BANK, LD. On these findings judgment was entered for the appellants for 46,440*l.* 3*s.* 7*d.* This amount was arrived at by deducting, by way of set-off from 52,682*l.* 5*s.* 8*d.*, the total damages awarded by the jury (45,182*l.* 5*s.* 8*d.* plus 7500*l.*), the amount proved to be due to the respondent bank as unsecured creditors of the appellant Wilson.

The Court of Appeal (Pickford and Bankes L.JJ. and Sargant J.) granted a new trial of the action on the ground that the judge had not sufficiently directed the attention of the jury to the question whether it was the defendants' negligence which produced the results alleged by the plaintiffs, and on the further ground that the damages had been assessed on a wrong basis and were excessive.

The facts are fully stated in the judgment of Viscount Finlay.

The arguments are reported only on the question of the effect of the finding of the jury as to the damage sustained by the appellant Wilson personally by reason of the injury to his credit and reputation

1919. April 29; May 1, 2, 5, 6. *McCall K.C.* and *Rigby Swift K.C.* (with them *H. St. John Field*) for the appellants. The right of action in respect of the injury to the bankrupt's credit and reputation remains in the bankrupt and does not pass to his trustee in bankruptcy (*Beckham v. Drake* (1)), and in the circumstances of the case the damages awarded under this head are not excessive.

Douglas Hogg K.C. and *H. H. Joy* for the respondents. As regards the loss arising from the breach of the agreement to maintain the bankrupt's credit and reputation the appellants can only claim any pecuniary damage thereby occasioned. *Addis v. Gramophone Co.* (2) applies. This is not like a case of libel or of slander on a trader in the way of his trade, in neither of which cases is proof of special damage required. Damages for breach of promise and for dishonouring a trading

(1) (1849) 2 H. L. C. 579, 604.

(2) [1909] A. C. 488.

customer's cheque where the customer's account is in credit are admittedly exceptions to the general principle. H. L. (E.)

McCall K.C. replied.

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

The House took time for consideration.

1919. June 2. LORD BIRKENHEAD L.C. (read by LORD ATKINSON). My Lords, in my opinion this appeal must be allowed. I have had the advantage of reading the judgment of my noble and learned friend Lord Finlay. I do not, for the reasons which I will presently state, agree with his conclusion as to damages, but I desire to avail myself of the statement of facts which is set out at the beginning of his speech. No useful purpose can be served by repeating it here.

The case as presented to your Lordships presented many elements of doubt and confusion. The difficulties were by no means inherent in the nature of the case, which, though a little complicated, presented no very unusual features: they arose, in my opinion, from the manner in which the matter was dealt with in the Court of first instance, and particularly from the failure of counsel for the defendants to elucidate many matters which ought to have been closely tested and examined. Indeed, it is difficult even now to feel sure that every consideration was placed before the jury which was useful and relevant to their decision. This apprehension certainly causes me some anxiety, but I have carefully read the whole record of the proceedings and I have reached the conclusion that the case for the plaintiffs was presented to the jury without the slightest ambiguity. It was open to the defendants to challenge it at every point. They were afforded repeated opportunities of making suggestions to the learned judge. The course actually adopted, and in which they readily acquiesced, was such as to involve them in complete responsibility for the form in which the issues were presented for decision.

It is convenient to make two further observations of a general character. In the first place I wish to make it clear, especially having regard to the view taken in the Court of Appeal, that in my opinion the learned judge who tried this

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIESBANK,
LD.Lord
Birkenhead
L.C.

case discharged his duty with extreme care and with a constant and most praiseworthy desire to avoid the necessity for further litigation. He was in no way responsible, in my judgment, for the failure of his efforts. In the second place I think it necessary to point out that, unless the circumstances are wholly exceptional, appellants must be strictly held to the grounds of appeal which they think proper to set forth in the formal documents which are demanded from them. The object of indicating in detail the grounds of appeal, both to the Court of Appeal and to your Lordships' House, is that the respondent parties may be accurately and precisely informed of the case which they have to meet. Their efforts are naturally directed to the contentions which are put forward by the appellants. They are entitled to treat as abandoned contentions which are not set forth. If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal. In the present case, both in the Court of Appeal and before your Lordships, entirely new contentions have been submitted on behalf of the defendants. The practice is extremely inconvenient and ought in my judgment to be discouraged in every possible way.

My own conclusions in this case have been reached by the process, entirely justified by the action of the parties, of treating the questions which were put to the jury as agreed questions of which neither the form nor the sufficiency can now be impeached. They were, and the answers to them were, as follows: (1.) Did Mr. Roper on behalf of the defendants on November 2, 1914, agree with the plaintiff amongst other things, (a) That Mr. Cremonini would generally supervise the plaintiff's business and see it carried on, and in particular the financial side thereof? (Answer)—Yes. (b) That the defendants would take all reasonable steps to maintain the plaintiff's credit and reputation and that the plaintiff could rely on the defendants to look after his financial affairs? (Answer)—Yes. (2.) Did the defendants undertake and commence to supervise the carrying on of the plaintiff's business

and the maintenance of his credit and financial affairs ? (Answer)—Yes. (3.) Were the defendants guilty of negligence in the performance of their duties under the said agreement ? (Answer)—Yes. (4.) Was such negligence the cause (a) of the proceedings taken by the creditors against the plaintiff ? (Answer)—Yes. (b) Of the loss of the plaintiff's credit ? (Answer)—Yes. (c) of the creditors requiring that a deed of assignment should be executed by the plaintiff ? (Answer)—Yes. (d) Of the plaintiff's subsequent bankruptcy ? (Answer)—Yes. (5.) What was the damage in money to the plaintiff's business and estate caused by such negligence ? (Answer)—45,182*l.* 5*s.* 8*d.* In arriving at the same, at what amounts do you put the Ackleton Estate ? (Answer)—27,600*l.* And Chesterton ? (Answer)—10,150*l.* (6.) What was the additional damage (if any) sustained by the plaintiff personally by reason of any loss to his credit and reputation caused by such negligence ? (Answer)—7500*l.*

Now, my Lords, it is contended in the notice of appeal that there was no evidence of the agreement referred to in the earlier questions, but I find that no such point was taken in the Court of first instance. Indeed, at p. 1478 of the Appendix, the following conversation took place between the learned judge and Sir Ernest Pollock, counsel for the defendants: Bray J. : " But now you say this, that there was no evidence that Mr. Cremonini and Mr. Roper agreed that Mr. Cremonini would generally supervise the business and see it carried on and particularly the financial side thereof. Do you say there is no evidence of that ? " Mr. Pollock : " No evidence of that as against the bank to bind the bank." This answer can only mean, unintelligible as this conclusion is, in relation to other observations of the same learned counsel, that Sir Ernest Pollock was limiting his contention to the view that although there might be evidence of an agreement against the agents, there was none against the principals. But in the course of the hearing the contention that the parties who actually entered into the agreement with Major Wilson were not acting in behalf of the bank was expressly abandoned. The observations of Pickford L.J.

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.Lord
Birkenhead
L.C.

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.Lord
Birkenhead
L.C.

are similarly available to make clear Sir Ernest Pollock's attitude in the Court of Appeal. "I take it," said the learned Lord Justice, "that what Sir Ernest Pollock meant in opening the appeal was this: 'If I cannot question this verdict and judgment upon any other ground, I do not intend to try to do so upon the question of agreement, because there was evidence both ways and I cannot say that the jury could not have found what they did.'" No exception was taken by counsel for the present respondents to this statement of their attitude.

It is, then, quite clear that the defendants, in both the Courts below, have disentitled themselves from recourse in this House to the contention that there was no evidence of the agreement which the jury could, without perversity, accept. In neither Court was the point taken that the verdict was against the weight of the evidence. The Court of Appeal, I confess, arrived at a conclusion which somewhat surprises me. They were not prepared to accept the findings of the jury upon the damages as satisfactory. For this view much can be said, though in my judgment it ought to have been said at the trial and not in the Court of Appeal; but the Lords Justices, not content with sending the case back in order that the issues of damages might be retried, remitted the matter at large, so that the whole issue, contract or no contract, might be reheard *ab initio*. My Lords, I cannot assent to the reasonableness of this direction. The matter has been most fully and carefully tried by a jury which was both painstaking and intelligent.

The defendants, in their pleading, raised a charge of fraud against the plaintiff. They withdrew it in the course of the hearing. As part of the story of this somewhat unusual case the plaintiff was fully entitled that the jury which was to decide the issue of credibility between himself and the bank's representatives should be informed of the exact history of this important circumstance. No jury could be so informed unless the bringing of the charge and its withdrawal had taken place in their presence. And I cannot see, on much broader grounds, any reason whatever why, where the issues in a case are conveniently severable, where the plaintiff in the view of

the Court of Appeal has succeeded on one and failed in another, he should be compelled to refight his whole battle before a fresh jury. I observe with satisfaction that my noble friend Lord Finlay, who has reached a different conclusion from my own upon the issue of damages, agrees with the majority of the Court that under no circumstances ought the question of the agreement and of its implications to be reopened.

Now, my Lords, the record here is extremely lengthy. Much of it is no longer relevant. I studiously avoid any details which are not actually necessary in order to elucidate or justify the conclusions which I venture to recommend. Indeed, I found myself almost entirely upon the questions put to the jury, and upon the jury's answers, and upon the inferences which, in my judgment, must be drawn from the conduct of the case before the trial Judge by counsel for the defendants. I approach the matter, therefore, upon the basis (1.) that the defendants agreed to supervise the plaintiff's business during his absence at the war, and more particularly the financial side of it. (2.) That they agreed to take all reasonable steps to maintain the plaintiff's credit and reputation. And I accept the findings of the jury that the defendants addressed themselves to these duties and were guilty of negligence in their discharge. It follows, therefore, under the circumstances to which I have adverted, that in this part of the case there is nothing to retry. The plaintiff has secured his verdict ; there was evidence to support it ; and he is entitled to keep it.

There remains the question of damages. Here again I accept the findings of the jury upon questions for the form of which the defendants were equally responsible with the plaintiff. I approach the matter, therefore, with the conclusions formed for me by the jury, that the negligence of the defendants caused the loss of the plaintiff's credit, rendered necessary his deed of assignment, and ultimately involved him in bankruptcy. It only remains to consider the amount of the damages. The jury have found that the plaintiff's business, and the estate, sustained damage, by reason of the negligence of the defendants, to the amount of 45,182*l.* 5*s.* 8*d.* I am by no means completely satisfied that the basis upon which

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.Lord
Birkenhead
LC.

H. L. (E.) this claim was formulated was the right one. But it was put forward from first to last by the plaintiff as the true basis.

1919

WILSON v. UNITED COUNTIES BANK, LD.

Lord Birkenhead L.C.

It was open to the defendants to challenge on principle the method in which the claim was presented. Not only did they not do so, but their conduct seems almost to suggest that they were not concerned so much to quarrel with the general method in which the claim was presented as to challenge its details. Being defeated in the Court of first instance, the defendants were enabled, by the indulgence of the Court of Appeal, to raise entirely new contentions. They argued there, and argued with success, that the jury, while giving to the plaintiff all that he had lost, had not taken into account the assets still remaining in the hands of the trustee in bankruptcy. It is elementary that the proper time for this contention was before the trial Judge, and before the jury. The Court of Appeal, however, which hardly had before it the materials for a conclusion, allowed the appeal on the grounds that there were such assets, and that they had not been considered by the jury. Your Lordships gave the most careful consideration to this aspect of the case, and, in spite of the attitude of the defendants at the trial, decided *ex abundanti cautela* to refer the matter to the learned judge for his decision upon the question whether there still remained in the hands of the trustee valuable assets for which credit had not been given. This course was adopted with the consent of the parties, who agreed upon the form of the reference, and consented that the finding of the learned judge upon this point should be final. The learned judge has found in terms that there are no such assets, and has ordered the respondents to pay the costs of this further inquiry. Under these circumstances, I am of opinion that the finding of the jury must stand. I gather that some of your Lordships suspect that if there is no such additional value in the assets which are vested in the trustees, the explanation must be that they have undergone depreciation by causes arising from the abnormal conditions of the times and not from the negligence of the defendants. This may or may not be true. But if it be true, it was the duty of the defendants when the plaintiff put forward his claim to damages

to say: "This claim cannot be sustained. It is true that certain of the assets have shrunk, but for this the war and not our negligence is responsible." It would even have been possible for the defendants, at the eleventh hour, to have invited your Lordships to submit the further point to the learned judge. But they naturally did not do so, because not even before your Lordships had they argued this point with any seriousness. They had, on the contrary, busied themselves with the contention that the assets had great value, and that this value had been ignored. I am, therefore, quite unable to see any reason for encouraging the rehearing of any part of this case.

There remains only to be considered the finding of the jury that the plaintiff had personally and additionally sustained damage to the extent of 7500*l.* as the result of the same negligence. Judgment in fact was entered for the aggregate amount of the two sums—namely, 45,182*l.* 5*s.* 8*d.* and 7500*l.*, less the amount of the unsecured balance of the debt due to the defendants. It was entered in favour of the two plaintiffs, Major Wilson and his trustee in bankruptcy. I have on the whole reached the conclusion, though not without hesitation, that under the peculiar language of the agreement found by the jury the 7500*l.* is recoverable and is recoverable by Major Wilson himself. The express obligation of the defendants was to maintain the credit of Major Wilson as a trader. They broke this contract. In my opinion this breach was actionable, and the right of action remained with Major Wilson for the reasons given by Erle J. in *Beckham v. Drake* (1): "The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, *mind*, or *character*, and without immediate reference to his rights of property. Thus it has been laid down that the assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, *defamation*, *battery*, *injury to the person by negligence*, as by not carrying safely, not curing, not saving from imprisonment by process of law." My noble and

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES

BANK,

LD.

Lord
Birkenhead

L.C.

(1) 2 H. L. C. 579, 604.

H. L. (E.) learned friend Lord Atkinson has very carefully collected
 1919 all the authorities upon this point, and I do not think
 WILSON it necessary to repeat them, as I am in agreement with his
 v. conclusion.
 UNITED

COUNTIES
 BANK,
 LD.

Lord
 Birkenhead
 L.C.

The objection was taken by the defendants that this finding of the jury cannot be supported without proof of special damage. In deciding this point, I do not lay down a rule of general law, but I deal with the exceptional language of an exceptional contract. The defendants undertook for consideration to sustain the credit of the trading customer. On principle the case seems to me to belong to that very special class of cases in which a banker, though his customer's account is in funds, nevertheless dishonours his cheque. The ratio decidendi in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of special damage, reasonable compensation for the injury done to his credit. The leading case upon this point is that of *Rolin v. Steward*. (1) The direction of Lord Campbell to the jury has been generally accepted and treated as an accurate statement of the law. If it be held that there is an irrebuttable presumption that the dishonour of a trader customer's cheque in the events supposed is injurious to him and may be compensated by other than nominal damages, the conclusion would appear to follow almost a fortiori that such damages may be given where the defendant has expressly contracted to sustain the financial credit of a trading customer and has committed a breach of his agreement.

I am, therefore, of opinion that this appeal must be allowed, with costs here and below, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, this is an appeal by the plaintiffs against the order of the Court of Appeal directing a new trial. The case was tried before Bray J. and a special jury and resulted in verdict and judgment for the plaintiffs

for 46,440*l.* 3*s.* 7*d.* The plaintiff Wilson for many years carried on business as a maltster at Ackleton near Bridgnorth in Shropshire. He was an officer in the yeomanry, and after the outbreak of war he had to leave on service. The action was brought upon an agreement which it was alleged the defendant bank had made with him to look after his business during his absence. It was alleged that the negligence of the bank in the discharge of the duty they had undertaken caused his bankruptcy and the action was brought to recover damages; Arter, the trustee in bankruptcy, being joined as a co-plaintiff.

H. L. (E.
1919
WILSON
v.
UNITED
COUNTIES
BANK,
LD.
Viscount Finlay.

From February, 1909, onwards Mr. Wilson had banked with the defendant bank of which the second defendant Roper was the general manager and a Mr. Cremonini the local manager at Bridgnorth. Mr. Wilson was allowed an overdraft of 26,000*l.* (afterwards increased to 29,000*l.*) against which the bank held security. Before leaving on service the plaintiff Wilson had an interview with Mr. Cremonini on November 1, 1914, and with the defendant Roper on the day following. It was at this second interview that the agreement sued on was said to have been made. The findings of the jury as to this agreement were given in their answers to the first question put to them by Bray J. That question with the answers thereto was as follows: "Did Mr. Roper on behalf of the defendants on November 2, 1914, agree with the plaintiff among other things—(a) that Mr. Cremonini would generally supervise the plaintiff's business and see it carried on, and in particular the financial side thereof? (Answer)—Yes. (b) That the defendants would take all reasonable steps to maintain the plaintiff's credit and reputation and that the plaintiff could rely on the defendants to look after his financial affairs? (Answer)—Yes." The jury further found that the defendants undertook and commenced to supervise the carrying on of the plaintiff's business and the maintenance of his credit and financial affairs; that the defendants were guilty of negligence in performance of their duties under the said agreement; and that such negligence was the cause of the loss of the plaintiff's credit and ultimately of his bankruptcy. There was

H. L. (E.) evidence fit to be left to the jury in support of the agreement alleged by the plaintiff (indeed, this was admitted in the Court of Appeal by the counsel for the bank), and, in my opinion, the findings that the agreement was made and that supervision was exercised over the plaintiff's business in pursuance thereof should stand.

1919
WILSON
v.
UNITED
COUNTIES
BANK,
LD.
Viscount Finlay.

The negligence alleged was with reference to actions brought by certain creditors against the plaintiff Wilson. On December 18, 1914, solicitors wrote on behalf of Messrs. Downing demanding payment of 102*l.* 5*s.* and threatening immediate proceedings. This letter was handed by the clerk in charge to Mr. Cremonini. He did not inform the plaintiff Wilson, who left for France on December 23. A writ against Mr. Wilson's firm claiming the 102*l.* 5*s.* was served on the clerk in charge on December 23. He informed Mr. Cremonini, who wrote to the general manager. The bank appeared to have taken the erroneous view that the service was bad and that judgment could not be obtained owing to the provisions of the Courts Emergency Acts. Nothing whatever was done, with the result that judgment went by default on January 8, 1915. On the same day two other writs were served, on behalf of Messrs. Smith for 349*l.*, and on behalf of Messrs. Spillers and Bakers for 728*l.*; and on January 16 judgment was signed in each of those cases in default of appearance. Bray J., in his summing up, asked the jury whether the bank, through its officials, had been negligent in not communicating with Wilson in regard to these actions and in allowing judgment to go by default. The jury found negligence, and there is certainly evidence which would warrant their finding. It is true, as the learned judge reminded the jury, that the bank were under no obligation to increase the plaintiff's overdraft beyond the sum of 29,000*l.* for the purpose of meeting the debts which formed the subject of the actions. But the means to discharge the claims of the plaintiffs in these actions might have been obtained by calling in debts due to Wilson's firm or by disposing of some of the stock. The defendants did nothing whatever, and the jury were entitled to find that they did not discharge the duties which they had

undertaken to Mr. Wilson. Indeed, it would be surprising if the jury had arrived at any other conclusion.

It was alleged by the plaintiffs that the negligence of the bank in allowing judgment to go by default led to the destruction of the plaintiff Wilson's credit, to proceedings by his creditors generally, and ultimately to his bankruptcy. On this point Bray J. put specific questions to the jury. His questions, with the findings of the jury, were as follows: "Was such negligence the cause, (a) Of the proceedings taken by the creditors against the plaintiff? (Answer)—Yes. (b) Of the loss of the plaintiff's credit? (Answer)—Yes. (c) Of the creditors requiring that a deed of assignment should be executed by the plaintiff? (Answer)—Yes; (d) Of the plaintiff's subsequent bankruptcy? (Answer)—Yes."

The question of damages was fully and elaborately argued on both sides, and has been the subject in this House of the most careful and anxious consideration. On this subject two questions were put to the jury: "What was the damage in money to the plaintiff's business and estate caused by such negligence? (Answer)—45,182*l.* 5*s.* 8*d.* In arriving at the same, at what amount do you put the Ackleton Estate? (Answer)—27,600*l.* And Chesterton? (Answer)—10,150*l.* What was the additional damage, if any, sustained by the plaintiff personally by reason of any loss to his credit and reputation caused by such negligence? (Answer)—7,500*l.*" On these findings judgment was entered for the plaintiffs for 46,440*l.* 3*s.* 7*d.* This amount was arrived at by deducting by way of set-off from 52,682*l.* 5*s.* 8*d.*, the total damages as found by the jury (45,182*l.* 5*s.* 8*d.* plus 7500*l.*), the amount of the debt due to the defendant bank, 6,242*l.* 2*s.* 1*d.* These two heads of damages, 1. that relating to the business and estate; and 2. that relating to the plaintiff Wilson's loss of credit and reputation, require separate consideration.

1. As to the business and estate, the plaintiffs' case was put in this way. The excess of assets over all liabilities on October 31, 1914, was found to be 25,073*l.* 17*s.* 8*d.* The plaintiffs had claimed a much larger sum on this head as shown in the balance sheet put in at the trial and printed on p. 1488 of the Appendix.

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Viscount Finlay.

H. L. (E.) On the left-hand side of that balance sheet the debts, as on
 1919 October 31, 1914, are shown as 67,259*l.* 2*s.* 4*d.*, and this amount
 WILSON was found by the jury to be correct. The assets are shown
 v. on the other side of the balance sheet as of the same date.
 UNITED The jury appear to have gone most carefully through the list
 COUNTIES of assets, in many cases reducing the value. Their alterations
 BANK, are shown in red ink, and the value of the assets on October 31,
 LD. 1914, was found by the jury to be 92,333*l.* The difference
 Viscount Finlay. between the amount of debts and the amount of assets,
 i.e., 25,070*l.*, forms the first head of damage to the estate
 as being the capital value of the business and property, an
 asset which is treated as having been totally lost. This sum
 of 25,070*l.* did not, however, represent the whole damage
 to the estate as found by the jury, for not only had its capital
 value been lost, but the debts remained and the only asset
 available for the liquidation consisted of a sum of 8,500*l.*
 which was in the hands of the trustee. The debts amounted
 to—(1.) 8500*l.* (the debts to creditors admitted by the trustee
 in bankruptcy), (2.) 5866*l.* 5*s.* 1*d.* (Mrs. Hewitt's proof in
 bankruptcy), and (3.) 6242*l.* 2*s.* 1*d.* (the amount of the
 defendant bank's proof in bankruptcy).

It was said that in order to put the plaintiff Wilson in the
 same position in which he was in October, 1914, he ought to
 have, in addition to the capital value of the business and estate,
 a sum sufficient to enable him to pay the outstanding debts.
 In addition to the amount of undischarged debts with which
 the estate was saddled, it was found by the jury, as appears by
 the table on p. 487 of the Appendix, that there had been certain
 losses as follows: (1.) 1750*l.*, loss of income from maltings;
 (2.) 2250*l.*, loss of income from farms; (3.) 4000*l.*, damage to
 the business and goodwill of the maltings. Taking all these
 items into account the jury gave for damages to the business
 and estate the sum of 45,182*l.* 5*s.* 8*d.*, consisting of the items
 in respect of debts and losses which I have just enumerated,
 and of the 25,072*l.* 17*s.* 8*d.*, the capital value of the business
 as on October 31, 1914. It was strenuously contended for
 the respondents that the amount allowed on this head was
 excessive, and that it ought to have been reduced by taking

into account on the other side, in addition to the 8500*l.* cash in the hands of the trustee, the value of certain other assets said to be in his hands, including the value of the "equities of redemption," being the values of the properties in excess of the amounts for which they were charged. After a great deal of discussion it was agreed that the question of the existence of such assets should be decided by Bray J., and he has reported to your Lordships that there are no such equities of redemption or other assets of any value. It is obvious that this verdict as to the damage to the business and estate can be supported only on the basis that all the assets, except the 8500*l.* cash, have been totally lost by reason of the bankruptcy, so that not only has the whole value of the business and estate disappeared, but that it is now represented by a minus quantity in respect of the amount of the debts which remain unliquidated. The disappearance of the assets would appear to be established. But the question how far their disappearance was caused by the bankruptcy requires, I think, further consideration, and there should, in my opinion, be a new trial on this head of damage to the business and estate.

The fact that the estate has been transferred from Mr. Wilson to the trustee is not for this purpose material—the trustee is a party to the action and the claim is that by reason of the bankruptcy it has been depreciated in value. It is not a question on this head of replacing the plaintiff Wilson in the position in which he was before the bankruptcy—the question is what loss has been caused to the estate itself by the bankruptcy. While the learned judge most explicitly told the jury that they must find whether the bankruptcy was caused by the negligence, the question whether the disappearance of the assets was caused by the bankruptcy itself was not put to them. It certainly required consideration. Bankruptcy may lead to the sacrifice of the estate by forced sale, and if the sale takes place at a time when the market is unfavourable, the person by whose default the bankruptcy was brought about is responsible for the whole loss so caused. But for mere depreciation in the value of assets he would not be

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Viscount Finlay

H. L. (E.) responsible unless it was caused by the bankruptcy. Great
 1919 shrinkage in the value of assets might take place owing to
 WILSON war, or to other causes of a general nature, and for this the
 v. defendant in such an action as the present would not be liable.
 UNITED It seems very possible that shrinkage from such causes may
 COUNTIES account for a considerable amount of the loss in the present
 BANK, case. For instance, it might account for the disappearance as
 LD. assets of the "equities of redemption," of which we heard so
 Viscount Finlay much.

Pickford L.J., in giving his reasons for thinking that there should be a new trial, laid great stress on the fact that the assets still remaining in the trustee's hands had not been taken into account. He says (App., p. 1542): "As far as I can make out not one penny of those has ever been considered." After referring to the credit given for the 8500*l.* cash, he goes on to say: "but not one penny of the assets as shown on the credit side of the balance sheet has been taken into account at all and a great proportion of it is in the trustee's hands. . . . It seems to me that must be wrong." As a matter of fact, we now know that there are no such assets in the hands of the trustee. If their disappearance was caused by the bankruptcy, there is an end of the matter. But was it so caused? Bankes L.J. in his judgment (App., pp. 1545-6) refers especially to the equities of redemption and says (p. 1546B): "It seems to me that, in order to justify their case as presented to the jury, the plaintiffs ought to have given evidence that, although on the figures as presented there was apparently a very considerable value in the equities, the events which had happened had so depreciated them that they were really of no value." In this sentence the learned Lord Justice in using the words "the events which had happened" must, I think, have meant to say "the bankruptcy." We now know from the report of Bray J., that the equities are of no value. But from what cause? This question appears not to have been considered at all. It was of capital importance. If the absence of value in the equities be due to shrinkage in the value of the properties charged, so that there is no margin beyond the sums secured, and if this shrinkage be due to general causes affecting the

value of property, the loss is not caused by the bankruptcy and the bank ought not to have been charged with it. Where there has been no forced sale in consequence of the bankruptcy, those responsible for the bankruptcy cannot be held liable for a fall in value in assets in no way due to the bankruptcy. It is not easy to see how the bankruptcy could affect the equities of redemption, and this no doubt led the Court of Appeal to assume that they must still have a considerable value in the hands of the trustee. That value has disappeared, and it is probable that its disappearance was due to causes other than the bankruptcy. Neither party at the trial raised any question as to the cause of the disappearance of these assets. But if there be reason to think that there may have been a serious miscarriage, I do not think that failure of the parties to raise the point ought to prevent us from directing further investigation, subject to the imposition of proper terms as to costs. What had to be determined was the value of the estate in October, 1914, having regard to the nature of the business and all the circumstances and contingencies, and to what extent this value was lost by reason of the bankruptcy. The burthen of proof that the bankruptcy was the cause of the loss was upon the plaintiffs. They put their claim in a form which assumed an answer to this question in their favour and the defendants failed to raise the point. I cannot avoid the conclusion that there has been miscarriage with regard to this, the largest item in the damages, and on this point I agree with the Court of Appeal in thinking that there ought to be a new trial. The jury do not seem to me to have been asked to apply their minds to the crucial question.

2. There remains for consideration the finding of the jury for 7500*l.* for damage sustained by the plaintiff personally by reason of loss to his credit and reputation caused by the bankruptcy which resulted from the defendants' negligence. It seems clear upon the terms of the findings of the jury that this sum is given purely in respect of damage to the plaintiff personally apart from and in addition to all damage to the estate. The two leading cases on the subject of damages personally to a bankrupt are *Rogers v. Spence* (1) and *Beckham*

(1) (1846) 12 Cl. & F. 700.

H. L. (E.)

1919

WILSON

v.

UNITED

COUNTIES

BANK,

LD.

Viscount Finlay.

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Viscount Finlay.

v. Drake. (1) On principle and from these two cases it appears clear that, while all causes of action for damage to the property vest in the trustee, any cause of action for damage to the person or reputation of the bankrupt would remain vested in him in spite of his bankruptcy. As both Mr. Wilson and his trustee in bankruptcy are joined as plaintiffs, it may not for the present purpose be very material whether Mr. Wilson or his trustee is the person in whom the right of action is vested; but in my opinion it is vested in Mr. Wilson as being purely personal to him and altogether separate from damage to the estate. It is clear that the fact of bankruptcy must injure the credit of the person made bankrupt apart from damage to the estate. In an action for negligence against a solicitor leading to the bankruptcy of his client, even if owing to fortuitous circumstances, the estate had not been damaged, it seems on principle that the jury might give substantial damages for injury to the credit of the person made bankrupt. For a libel falsely imputing bankruptcy to the plaintiff, damages might be recovered in respect of injury to his credit. It is difficult to see on what principle such damages might not be given if there has been an actual bankruptcy as the result of breach of contract on the part of the defendant to take steps to prevent it. If the imputation of bankruptcy would give a right to such damages in an action for libel, why should not the fact of the bankruptcy owing to the defendants' breach of duty confer a similar right upon the plaintiff? It was urged that proof must be given of special damage in order to sustain the verdict on this head for more than nominal damages. I cannot see on what principle this contention rests. The mere fact of bankruptcy imports damage to the credit of the bankrupt. It is a natural consequence, and it is for the jury to assess the damages for such a slur. There was nothing excessive in the sum given on this head, 7500*l.*, and I do not think that any case has been made for disturbing the verdict on the point.

In the result, I think that there ought to be a new trial on the one question of damages in respect of the business

(1) 2 H. L. C. 579.

and estate, but that the findings of the jury in all other respects should remain undisturbed. H. L. (E.)

LORD ATKINSON. My Lords, the facts have already been so fully stated that I shall only repeat them so far as may be needed to make intelligible what I am about to say.

On the tenth day of the trial some discussion arose between the presiding judge, Bray J., and the counsel for the parties as to the questions which should be submitted to the jury. The learned judge said that he himself had considered them, but invited the counsel to put on paper any particular question they respectively might desire to have put to the jury. On the following day Mr. McCall, on behalf of the plaintiffs, stated to the learned judge the questions he desired to have put. Mr. Pollock (as he then was), on being asked by the learned judge had he formulated any question, replied in the negative. The learned judge then read out a question with two branches which he himself had framed, namely, this : " Did Mr. Roper on behalf of the defendants on November 2, 1914, agree with the plaintiff Major Wilson, (a) that Mr. Cremonini would generally supervise the plaintiff's (Wilson's) business and see it carried on, and in particular the financial side thereof ; (b) that the defendants would take all reasonable steps to maintain the plaintiff's credit and reputation and that the plaintiff could rely on the defendants to look after his financial affairs ? " After the learned judge had read the first limb of this question he asked Mr. Pollock if that suited him better than the other, to which Mr. Pollock replied : " Yes, I think so." Whereupon the learned judge said : " Then I shall adopt that." The learned judge then read out the second limb of the question, when Mr. Pollock said he wanted a separate question to be put—namely, up to what amount did the responsibility extend ? To which the learned judge replied that he would tell the jury they must not assume that the defendants were under any liability to grant an extended credit ; that it could not be so contended, and that he did not think Mr. McCall had contended it. Upon which Mr. McCall interposed and said he did not contend that nor had he ever contended it. The learned

1919
WILSON
v.
UNITED
COUNTIES
BANK,
LD.

H. L. (E.) judge then mentioned the next question he proposed to put—
 1919 namely, “Did the defendants undertake and commence to
 WILSON supervise the carrying on of the plaintiff’s business and the
 v. maintenance of his credit and financial affairs?” Again
 UNITED Mr. Pollock put the question up to what amount did the respon-
 COUNTIES sibility extend? And again it was made clear to him that
 BANE, the limit of the plaintiff’s overdraft could not be exceeded.
 LD. Mr. Pollock replied: “Very well.” Counsel on both sides
 Lord Atkinson. then addressed the jury. The learned judge sent up to the
 jury a copy of these two questions amongst others, and in
 his summing up said, in reference to the first question:
 “Mr. Pollock says, and rightly says, you have to be satisfied
 that there really was an agreement on that date. Now I do not
 think there can be much doubt because I find Mr. Cremonini
 was asked a question or two on the tenth day, and it was very
 important for you to say whether the parties were agreeing
 or merely talking.” The learned judge then proceeded to
 call the attention of the jury in elaborated detail to the evidence
 given on each side bearing on the two heads of this first question.
 It is perfectly clear from this that Mr. Pollock, the counsel
 for the defendants, not only did not object to the first question,
 as framed, being left to the jury, but in effect consented to
 its being so left. The jury answered both branches of it,
 as well as the second question in the affirmative.

Bray J., in his formal judgment, says: “Whether there was a contract or not, whether there was a breach of it or not, and what were the consequences of that breach, were subject to the question whether there was evidence on these questions for the jury,” adding: “It was submitted to me (and I ruled upon it before it went to the jury) that there was no evidence of the contract. In my opinion there was evidence of the contract, and therefore the point of Mr. Pollock fails, and, of course, it is a point he is entitled to take elsewhere.” Accordingly, one of the grounds taken in the notice of appeal is that there was no evidence of the agreement mentioned in the first, the double question, or in the second question, but no point is taken to the effect that the finding of the jury on either of these questions was against the weight

of evidence. From the judgment of Pickford L.J. it would appear that in opening the appeal Sir Ernest Pollock, though he did not admit that the findings of the jury on the question of the agreement were right, yet in effect said that he did not argue that question on the hearing of the appeal, inasmuch as there was evidence both ways, and, therefore, the jury could have found as they did find. My Lords, if Sir Ernest thought there was no evidence to go before the jury upon which they could, as reasonable men, find as they have found on the first and second questions, he should have strenuously objected to those questions being left to the jury. It appears to me that he took his chance that the jury would answer these questions in his favour, and if that be so he is bound by the course of the trial: *Macdougall v. Knight* (1); *Seaton v. Burnand*. (2) It must therefore be taken on the hearing of this appeal that the parties did enter into the agreement set forth in these questions. If that be so, the respondents were undoubtedly guilty of a breach of that agreement. For when actions were threatened or instituted against the plaintiff (Major Wilson) to recover debts due by him, they simply did nothing "to maintain his credit or reputation." They took no steps whatever. They neither called in debts nor sold such parts of his assets as they could have sold in order to procure funds to satisfy the claims of the creditors who pressed, nor did they even enter appearances to the writs served in order to obtain time or opportunity to raise the so-called point of law on which they apparently relied—namely, that, as the plaintiff was away, serving his country as a soldier, judgment could not be marked against him for the debts sued for. They were apparently advised, not by a professional man, but by some amateur lawyer upon their staff, that this absurd point was a good point, and they deliberately staked the plaintiff's vital interests on the soundness of that advice.

The findings of the jury that the defendants were guilty of negligence in the performance of the duties which their agreement imposed upon them, that this negligence was the cause of the

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Atkinson.

(1) (1889) 14 App. Cas. 194, 199.

(2) [1900] A. C. 135.

H. L. (E.) proceedings being taken by the creditors against the plaintiff
 1919 Wilson, and of the consequent injury to his credit and reputa-
 WILSON tion, were amply justified, and cannot now be disturbed.
 v. But it has been contended that, by reason of the plaintiff
 UNITED Wilson's intervention, in the month of January, in the manage-
 COUNTIES ment of his own financial affairs and of his attempt to ward
 BANK, off the disaster which then threatened him, the negligence
 LD. of the respondents was not the cause of his creditors requiring
 Lord Atkinson, a deed of assignment, or of his subsequent bankruptcy, and
 that, therefore, they were not responsible for the damage
 resulting to him from either of these events. Well, not even
 the attractive ingenuity and seductive reasoning of Mr. Hogg
 can convince me that this contention is sound ; for one has to
 consider what was the state of things when the intervention took
 place, and the object it was directed to effect. On January 9
 there were three writs out against Major Wilson, claiming to
 recover a considerable sum in the aggregate. No instructions
 had been given by the bank to Mr. Cremonini to procure by
 sale of any of the assets, or by any other means, the funds
 necessary to satisfy these claims in whole or in part, and
 Mr. Roper, on being asked by Bray J. did he think on this day
 it was all over then, and that nothing could save the plaintiff
 Major Wilson from bankruptcy, replied, "Practically,
 except a very considerable amount." The learned judge
 continued : "And that in January nothing could save Major
 Wilson from bankruptcy?" To which the witness replied,
 "It looked very like it, my Lord; there were three
 writs out against him." The learned judge then put
 to the witness the further question : "Will you tell me
 this—what instructions did you give to Mr. Cremonini
 to obtain money to prevent that, either by collecting debts
 or selling the stock on the farm or the barley or the malt ?"
 And the witness replied : "I do not think any definite instruc-
 tions were given to him." By January 11, 1915, judgment had
 been marked in the first of these cases, namely, the action
 brought by Messrs. Downing to recover a sum of 102*l.*, and by
 the next day a summons was about to be taken out by the
 solicitors of the plaintiffs Messrs. Downing to issue execution on

this judgment. This summons was returnable on January 20. Of this latter fact the general manager of the bank was duly informed by a letter from Messrs. Evershed & Tomkinson dated January 12. On January 11, 1915, Messrs. Evershed & Tomkinson had written a letter to Major Wilson addressed "Army Service Corps, British Expeditionary Force, Havre, France," explaining to him the critical position of his affairs, and suggesting to him that he should execute a power of attorney to some one, by preference the bank, to get him out of his difficulties with his creditors. The writers of this letter did not hear from Major Wilson till January 21, when they received a telegram from him from Havre running as follows : "Havre, 21 January, 1915. Yours just delivered. Act in conjunction with any advice from Pratt. Writing." The gentleman mentioned was a member of the firm of Hall & Co., Solicitors. On the 25th a fourth writ was served at the suit of W. L. Browne & Co. to recover the sum of 205*l.* 4*s.* In this crisis in his affairs Major Wilson no doubt intervened, but for what object ? Why, to ward off, if possible, the financial ruin about to be brought upon him by the negligence of the respondents. His efforts proved in the result abortive ; but the fact that they were made affords no defence to those whose negligence made the disaster imminent. If one man inflicts an injury upon another the resort by the sufferer to reasonable expedients for the bona fide purpose of counter-acting, curing or lessening the evil effects of the injury done him, does not necessarily absolve the wrongdoer, even though the sufferer's efforts should, in the result, undesignedly aggravate the result of injury. I think this is really the principle upon which the decision of *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (1), as well as that in *Reischer v. Borwick* (2), rests. And it is also that upon which rests the old decision in *Jones v. Boyce* (3), where, an accident having occurred to a coach, a passenger, in order to (as he thought) escape from the greater danger, jumped down and broke his leg. It was held that the damage for this injury was not too

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Atkinson.

(1) [1918] A. C. 359.

(2) [1894] 2 Q. B. 548.

(3) (1816) 1 Stark. 493.

H. L. (E.) remote. I think the respondents' contention on this point, therefore, fails. On all these points there was evidence
1919
WILSON
v.
UNITED
COUNTIES
BANK,
LD.
Lord Atkinson. the plaintiff Wilson's business and proposed to him that he should be empowered to let the maltings, urging that this would relieve him of a considerable amount of work, and that the maltings were let accordingly. It was not disputed that in this matter Mr. Cremonini and Mr. Roper were acting on behalf of the bank, and that any contract made by Mr. Roper was binding upon the bank. It follows that for any default in the performance of the contract with the plaintiff Wilson the bank would be liable.

The learned judge in his summing up presented the case fully and carefully to the jury on all these points, and in my opinion the respondents failed to establish that there had been misdirection with regard to any of them. The jury found in favour of the plaintiffs with large damages, with which I shall deal separately, and Bray J. gave judgment in the plaintiffs' favour. The case was taken to the Court of Appeal by the defendants, and the Court of Appeal expressed great dissatisfaction with the damages given by the jury. They held that a new trial on the question of the damages must be granted and further held that in these circumstances there should be a new trial on the question of liability as well. Against the order for a new trial the present appeal has been brought by the plaintiffs. In my opinion the findings of the jury as to the contract and the breach of it ought not to have been disturbed, and the findings that the negligence charged was the cause of the proceedings taken by the plaintiff's creditors, of the loss of the plaintiff's credit, of the deed of assignment and of the subsequent bankruptcy, were justified by the evidence. I think that there was no sufficient reason for ordering a new trial on the question of liability, and that if any new trial was to be granted at all, it should have been confined to the question of damages.

With regard to the damages awarded, I think it is pretty clear upon what principle they were roughly measured. Major Wilson, in effect, said : “ On my balance sheet of October 31, 1914, I was, upon the values fixed by the jury, worth 25,073*l.* 17*s.* 8*d.* over and above all my just debts. I am now worth nothing beyond the 8,500*l.* cash in the hands of my Trustee in Bankruptcy and I owe 20,000*l.* Therefore, give me as damages a sum which will enable me to pay these debts of mine, and will place me in the sound financial position which I occupied on October 31, 1914. In the heads of his claim it is put in this way. The damages must be such as to restore Major Wilson and his estate to the position occupied on October 31, 1914. Well, that was, of course, not the true measure of the damages. The true measure of the injury to Major Wilson’s estate, estimated in money, for which the respondents were answerable would, it appears to me, be the difference between the value of the estate before the committal of the act complained of and its depreciated value caused solely by the commission of that act with its consequences. The respondents could not be made responsible for depreciation in the value of any portion of the assets due to some cause quite independent of his bankruptcy, such, for instance, as a fall in its market value caused by the war. Again, it was not left to the jury to find the value of any of the assets belonging to the bankrupt vested in his trustee. These were no doubt incumbered, but the equity of redemption in one or more of them may have been of value, and, whatever that value was, Major Wilson’s estate has not been deprived of it. The case has from first to last, it would appear to me, been conducted by both sides on the assumption that all these were irrelevant topics. An effort was made to correct the omission at the trial to have this last-mentioned matter determined by the jury by the reference by consent to Bray J. of the question already mentioned for his determination. And he has found that at the date of the trial there were no assets of the estate for which credit should have been given beyond the sum of 8500*l.* in the hands of the trustee for which credit had, in fact, been given. I think the parties are bound by the course of the trial—

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Atkinson.

H. L. (E.) 1919
 WILSON
 v.
 UNITED
 COUNTIES
 BANK,
 LD.
 Lord Atkinson.

unsatisfactory as I think that trial was. I further think they are bound by the results of this reference by consent to Bray J. I am further of opinion that the mode in which the balance sheet of October 31, 1914, was dealt with was most misleading, and I am by no means satisfied that too much has not been awarded in respect of the alleged loss and damage to Major Wilson's estates. But if that be so, the respondents have themselves to blame, and cannot justly claim to be relieved from the result of the course persistently followed through the earlier stages of this litigation.

Of course, the sum awarded in respect of the injury to Major Wilson's estate vests in the trustee, but a question arises as to the person in whom vests the sum of 7500*l.* damages awarded in respect of the injury done to Major Wilson's credit and reputation. Is Major Wilson entitled to retain that sum for his own use, or does it pass to his trustee in bankruptcy? The difficulty involved in this question arises from the fact that the same breach of contract, the neglect of the defendants to take reasonable steps to maintain Major Wilson's credit and reputation, caused loss to his estate, and at the same time inflicted upon him as a trader (for it was in reference to his trade and business the contract was entered into) pain and humiliation and loss of credit and repute. That credit and repute, though of great value to him, was not part of his assets. Injury to it, though it might do him much harm, did not lessen or depreciate his property; and it would appear to me that the right of action in respect of this injury would no more pass to his trustee than would his right of action for slander reflecting on him as a trader published in the course of the bankruptcy proceedings.

In *Beckham v. Drake* (1) the plaintiff "A." entered into an agreement with the defendants to serve them for seven years at the fixed rate of wages of three guineas weekly, the party making default to pay to the other the sum of 500*l.* by way of special damage. "A." was dismissed, subsequently became bankrupt and, after bankruptcy, brought an action of assumpsit to recover this sum of 500*l.*, to which the

(1) 2 H. L. C. 579.

defendants pleaded his bankruptcy. It was held a good plea as the right of action passed to his assignees. The issue in fact raised on the pleadings was tried first, and a sum of 100*l.* awarded to the plaintiff. In the course of the argument *Brewer v. Dew* (1) and *Rogers v. Spence* (2) were cited. In the latter of these two cases the action was brought for breaking and entering the plaintiff's premises, damaging them, and exposing the plaintiff's goods for sale therein, by means of which the plaintiff was not only disturbed in the possession of his house, but also prevented from carrying on his business and was deprived of the enjoyment of his goods. The defendant pleaded that before the action was brought the plaintiff had become bankrupt. It was held on general demurrer to this plea that as there were some causes of action included in the declaration which would not pass to the assignee, the plea, which went to the whole of the declaration, and not to any particular portion of it, was insufficient and bad, but Lord Campbell said (3): "It is quite unnecessary to enter into the other points that have been discussed. There is no doubt that a cause of action which is exclusively confined to injury to property will pass to the assignees. In that case there is no difficulty. The difficulty is where there is (as in the case which has been put during the argument) a mixed case of injury to the person and injury to the property. There has been no case as yet, which has decided what, under such circumstances, is to happen. It may possibly be that the law will give an action to the bankrupt for the personal injury which has been sustained by him, and will give an action to the assignees for the injury which has been done to the property." In the former of these two cases, *Brewer v. Dew* (1), an action was brought for trespass for seizing and taking the plaintiff's goods under a false and unfounded claim of debt, "per quod the plaintiff was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house." It was held that this right of action did not pass to the assignees.

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Atkinson.

(1) (1843) 11 M. & W. 625. (2) 12 Cl. & F. 700.

(3) 12 Cl. & F. 720.

H. L. (E.) Lord Abinger, in giving judgment, laid down a test. It was this. Could the jury give vindictive damages beyond the mere value of the goods seized and taken? If so, the action does not pass to the assignees.

1919
WILSON
v.
UNITED
COUNTIES
BANK,
LD.
Lord Atkinson.

In *Beckham v. Drake* Erle J. said (1): "The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect to his body, *mind*, or *character*, and without immediate reference to his rights of property. Thus it has been laid down that the assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, *defamation*, *battery*, *injury to the person by negligence*, as by not carrying safely, not curing, not saving from imprisonment by process of law." Maule J. said (2): "There is no doubt that the right to bring an action for an injury to the person, *character*, or feelings of a bankrupt, does not pass to the assignees, and that the right to bring an action for the payment of money agreed to be paid to a bankrupt does pass. And it appears to me that the present action is in effect an action on a contract to pay money." The case was decided on this latter view, but Parke B., in addition to concurring in that view (3), deals with the case where only part of the damage was recoverable for the personal injury to the bankrupt. "That part," he says, "could not be transferred to the assignees, and ought not to be lost. . . . Who then are to sue for the breach of contract where part belongs to the assignee, part of the bankrupt? . . . Either the right of action on the contract must be divided, and each sue, or the right of action altogether must remain in the bankrupt, or altogether be transferred to the assignees, or both must join, the contract being entire, and sue for damages. In the first two cases the plea would be good, in the last two bad; for in the first it would be no answer to the entire cause of action; in the second, it would be no answer to any part. I should feel considerable difficulty in deciding the question, but this case does not depend upon it, for I have now to consider what the effect of

(1) 2 H. L. C. 604.

(2) 2 H. L. C. 621.

(3) 2 H. L. C. 628.

the penalty is." Ultimately he held that the right to the penalty could not remain in the bankrupt, and that therefore the plea was good.

In *Ex parte Vine* (1) it was decided that the Bankruptcy Act of 1869 did not affect the rule that a cause of action for injury to personal reputation (slander) did not pass to the trustee in bankruptcy. In *Rose v. Buckett* (2) it was held that where an action was brought for wrongful entry to the plaintiff's premises, and wrongful conversion of the plaintiff's goods, whereby the plaintiff suffered great personal inconvenience and annoyance to himself and his family by being wrongfully deprived of his property and of the quiet enjoyment of his house and premises from time to time by the defendant, it being admitted that no substantial damage was done to the premises or goods, the plaintiff's right of action did not, upon his bankruptcy, pass to his assignees. In *Brunsdon v. Humphrey* (3) the plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered there the amount claimed, brought a second action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff himself through the same negligence. It was held by Brett M.R. and Bowen L.J. (Lord Coleridge dissenting) that although the injury to the plaintiff's goods and the injury to his person were occasioned by the same wrongful act, they constituted infringements of distinct and different rights, creating distinct and different causes of action, and that consequently the successful prosecution of the first suit raised no bar to the institution of the second. In the present case by parity of reasoning it would seem to follow that the negligence of the defendants gave rise to two distinct causes of action, the one consisting of injury to the bankrupt's estate, the other personal and consisting of injury to his character, credit and repute; the first passing to his trustee, the second remaining vested in himself. If that be so, independent actions could have been

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Atkinson.

(1) (1878) 8 Ch. D. 364.

(2) [1901] 2 K. B. 449.

(3) (1884) 14 Q. B. D. 141.

H. L. (E.) 1919
WILSON
 v.
UNITED
COUNTIES
BANK,
LD.
 Lord Atkinson. The case of *Addis v. Gramophone Co.* (1) conflicts in no way with this conclusion. There the contract broken was a contract of service, and it was admitted the plaintiff was entitled to the net benefit of having the contract performed, and was, therefore, entitled to be put in the same position, as far as money could do it, as if it had been performed. What was contended for, however, was that he was also entitled to recover damages in respect of the hurt to his feelings and the injury to his reputation caused by the offensive and depreciatory manner in which he was, in breach of this contract, dismissed.

• The present case is wholly different. Major Wilson is not seeking to recover damages to any extent due to the breach, in such a manner as that of a contract not directly connected with his credit and reputation. He is seeking to recover damages for the injury caused to his credit and reputation by the defendants' neglect to perform the service they had by their contract bound themselves to perform—namely, to take all reasonable steps to maintain that credit and reputation. By withholding that service, the defendants directly caused Major Wilson to be ultimately made a bankrupt. It would appear to me that injury to the credit and reputation of a trader is not only a natural and reasonable result of his being made a bankrupt, i.e., such a consequence as would, in the ordinary course of things, flow from it, but must, in the present case, have been in the contemplation of the parties when they entered into the contract as the result which would probably follow from the breach of it, and that the damages therefore are not too remote: *The Argentino*. (2)

The present case differs also from the case (always treated as exceptional) of a banker who, having adequate funds in his hands to pay his customer's cheque, dishonours it. In

(1) [1909] A. C. 488.

(2) (1888) 13 P. D. 191, 197.

the latter case the banker does not contract to take any steps to maintain his customer's credit or reputation. His contract with his customer is to honour the latter's cheque while he has in his hands, to the customer's credit, funds available for that purpose. Yet the refusal to honour the customer's cheque while such funds are so available is held to be in itself so injurious to the customer's credit, if he be a trader, as to entitle him—though no special damage be alleged or proved—not merely to recover nominal damages, but to recover in the shape of damages temperate and reasonable compensation for the injury thus done to his credit. In *Rolin v. Steward* (1), which was a case of this character, no special damages being alleged or claimed, Lord Campbell directed the jury that they ought not to limit their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be reasonable compensation for the injury they must have sustained by the dishonour of their cheques. The jury found a verdict for the plaintiffs for 500*l*. A rule nisi was obtained on behalf of the defendants for a new trial on the ground of misdirection, and also on the ground that the damages were excessive. On the case coming on for argument on showing cause against this rule Jervis C.J. was absent, but the direction of Lord Campbell was upheld by three distinguished judges—namely, Cresswell, Williams and Crowder JJ. The reasons given for their decision are instructive. The statement of the law by Lord Tenterden in *Marzetti v. Williams* (2) was much relied upon. His Lordship there said: "I cannot forbear to observe, that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shews that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade." Cresswell J., in giving judgment, after quoting this passage, said (3): "His Lordship, therefore, assumes as a thing not to be disputed, that a breach of contract of this sort must of necessity be injurious to a person

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Atkinson.

(1) 14 C. B. 595.

(2) (1830) 1 B. & Ad. 415, 424.

(3) 14 C. B. 606.

H. L. (E.) 1919
 WILSON
 v.
 UNITED
 COUNTIES
 BANK,
 LD.
 Lord Atkinson.

in trade ; and, if so, the jury might properly take that into consideration, and give damages accordingly." He then proceeds to quote a passage from the judgment of Taunton J. in *Marzetti v. Williams*. (1) The passage runs thus : " Here, independently of other considerations, the credit of the plaintiff was likely to be injured by the refusal of the defendants to pay the check ; and as it was the duty of the defendants to pay the check when it was presented, and that duty was not performed, I think the plaintiff, who had a right to its being performed, is entitled to recover nominal damages." Cresswell J. proceeds : " Why ? Because the jury had a right to assume that it would be to some extent injurious : and, if so, it was for them to say to what extent. For these reasons, I am of opinion that the direction of Lord Campbell to the jury was right." Williams J., in giving judgment, said (2) : " I think it cannot be denied, that, if one who is not a trader were to bring an action against a banker for dishonouring a cheque at a time when he had funds of the customer's in his hands sufficient to meet it, and special damage were alleged and proved, the plaintiff would be entitled to recover substantial damages. And, when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract : just as in the case of an action for a slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage." It may be that the existence of this apparently indisputable presumption that the dishonour of a trader's cheque under the circumstances mentioned is necessarily injurious to him as trader, is the special feature which distinguishes this class of cases from others and makes them exceptional.

On the whole, I think that the appeal should be allowed with costs here and below.

LORD PARMOOR (read by LORD WRENBURY). My Lords,

(1) 1 B. & Ad. 427.

(2) 14 C. B. 607.

the appellant Wilson was, in 1914, carrying on, as sole partner, under the firm name of Richard Wilson & Son, an old-established business as hop merchant and maltster, at Ackleton, near Bridgnorth, in Shropshire. He also owned the freehold of a farm at Kingslow, and two farms at Chesterton. The appellant owned other stock and property including certain railway stocks, and the jury found that, on October 31, 1914, the total value of all the property of the appellant, without taking into account incumbrances, was 92,333*l.* There were on the other side incumbrances amounting to 67,259*l.* 2*s.* 4*d.*, so that in the result, on the finding of the jury, the appellant on the said date owned property (exclusive of goodwill) worth 25,073*l.* 17*s.* 8*d.* in excess of all his liabilities, except a contingent liability of 12,500*l.* under the marriage settlement of his sister, a Mrs. Hewitt. The most important liability of the appellant Wilson in October, 1914, was a bank overdraft, the appellant Wilson being authorized to draw on the respondent bank up to the limit of 29,000*l.*, but not beyond that limit. Immediately on the outbreak of war, the appellant Wilson was called up for service, and was unable to give personal supervision to his business and the respondent bank was insisting, for its own protection, that the appellant should make adequate arrangements to have the business carried on. In consequence an arrangement was made between the appellant Wilson and the bank which, after a prolonged trial, was found by the jury to be in the following terms: (1.) That Mr. Cremonini should generally supervise the appellant Wilson's business and see that it was carried on, and in particular the financial side thereof. (2.) That the respondent bank would take all reasonable steps to maintain the appellant Wilson's credit and reputation, and that the appellant Wilson could rely upon the defendants to look after his financial affairs. To put it shortly, the jury believed that Wilson was telling the truth and did not believe the representatives of the bank, Cremonini and Roper. It is moreover material that the respondent bank made a charge of fraud against Wilson, which they did not attempt to substantiate. My Lords, I think it would be inconsistent with the principles applicable

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Parmoor.

H. L. (E.) 1919
 WILSON
 v.
 UNITED
 COUNTIES
 BANK,
 LD.
 Lord Parmoor.

to jury trials, that the issue of the credibility of the appellant Wilson, under such circumstances, should be sent for retrial before a new jury. The jury further found that the respondents were guilty of negligence in the performance of their duties under the agreement, and that such negligence in the performance of their duties, under the agreement, was the cause of the proceedings taken by the creditors against the appellant, of the loss of the plaintiff's credit, of the creditors' requiring that a deed of assignment should be executed by the plaintiff, and of the plaintiff's subsequent bankruptcy. My Lords, in my opinion, the appellant is entitled to the benefit of these findings in reference to which there was reasonable evidence on which the jury might find the verdict, which they have given, and in reference to which careful directions were given to the jury by the trial Judge.

The question of difficulty in the case is whether the damages have been ascertained on a maintainable basis, or are of such an exaggerated character that justice would demand a new trial. In order to answer this question, it will be convenient to consider how the figure of damage to the business and estate of the appellant has been ascertained, and, secondly, the method of procedure which has been adopted on behalf of the respondent bank. In reference to the figure of damages, it was argued on behalf of the respondent bank that, in effect, the damages had been given twice over with the result, that the appellant Arter, the trustee in bankruptcy, in whom the business and estate are vested, would be in a position to restore to the appellant Wilson not only the value of an incumbered estate, but, in substance, the value of the estate free from incumbrances. In this connection, however, it must be remembered that the value of the appellant Wilson's estate in October, 1914, was worth no less than 92,333*l.*, if free from incumbrances, and that the incumbrances, 67,259*l.* 2*s.* 4*d.*, were deducted in arriving at the sum of 25,073*l.* 17*s.* 8*d.* I think that the position is clearly stated in the judgment of Pickford L.J. The learned Lord Justice, after stating that certain debts had not been paid, and that the jury had given the trustee the

amount necessary to pay them, and saying that the method might be right, assuming that it was a convenient way to start the assessment of damages by the balance sheet, although he was not sure that it was convenient, and was not quite sure that it was not misleading, adds: "Assuming that it was so taken, it may have been right, but then it seems to me to follow necessarily that, if that be done, there must be taken, as against that, the assets which still remain in the trustee's hands. As far as I can make out, not one penny of those has ever been considered. It is true that a sum of 8500*l.* cash in the hands of the trustee under the deed of assignment has been taken into account, but not one penny of the assets as shown upon the credit side of the balance sheet has been taken into account at all, and a great proportion of it is in the trustee's hands. It seems to me that must be wrong. I think the reason there in a great measure has been from what I respectfully call the fallacious way in which the case has been put—I am not meaning to say that it was improper, but I think it contains a fallacy." During the course of the trial there was a full discussion on the questions to be left to the jury, and the learned trial Judge expressed his anxiety that no fact should be overlooked, the determination of which might be necessary as between the parties. I cannot find any suggestion made on behalf of the respondent bank that there were any assets still remaining in the hands of the trustee which should be taken into account, and, although the possibility of the existence of such assets is not negatived, there is no indication that any such assets did in fact exist. At the same time I am in entire agreement with Pickford L.J. that if there were any such assets remaining in the hands of the trustee, their amount should have been ascertained, and a corresponding deduction made from the amount of the damages. It is very difficult to understand how, if there were such assets in existence, their importance should have been overlooked by the advisers of the respondent bank, but in order that the matter might be placed beyond doubt, it was arranged that the question should be submitted to Bray J. for his final determination.

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Parmoor.

H. L. (E.) 1919
WILSON
v.
UNITED
COUNTIES
BANK,
LD.
Lord Parmoor.

The learned judge, after hearing the parties, has notified to the House that there were no assets still remaining in the trustee's hands beyond the sum of 8500*l.* in cash, which had been deducted in the ascertainment of damages. It follows, therefore, that there are in fact no such assets as those to which Pickford L.J. referred, and that the question whether the amount of damages has been properly ascertained must be considered on the basis that in fact there were no such assets.

Personally I should have hesitated to permit the raising of this question having regard to the conduct of the parties at the trial, but it is a matter of satisfaction that the doubt has finally been set at rest. It is now clear that the advisers of the respondent bank did not at the trial claim a set-off of assets against the amount of damages, for the simple reason that the investigations had not disclosed any trace of the existence of any such assets. If there are no assets of value in the hands of the trustee except the cash sum of 8500*l.* I see no reason for doubting the accuracy of the amount awarded. The figures as ascertained by the jury are not in themselves subject to question, and the result is that an estate which on October 31, 1914, was of the value of 25,073*l.* 17*s.* 8*d.*, after allowing for all incumbrances except the contingent incumbrance in favour of Mrs. Hewitt, had not only become in itself of no value, but in addition was subject to a liability for debts to the extent of about 20,000*l.* This result was, in the opinion of the jury, attributable to the negligence of the respondent bank. In the assessment of damages, in a case like the present, there may be alternative methods of arriving at the amount, and it is not difficult to suggest that one of these alternative methods may give a more accurate result, but I think that the method adopted on behalf of the appellants, and not questioned at the trial on behalf of the respondent bank, is not in itself unsatisfactory, and that there is no ground for the suggestion that the damages are being paid twice over, so soon as it has been finally ascertained that the estate left in the hands of the trustee is of no value after allowing for the sum of 8500*l.* in cash. Unless the damages

did include an amount sufficient to liquidate the admitted claims in bankruptcy, it appears to me that the estate would not be restored to the value as of October 31, 1914, and that the trustee in bankruptcy would be left in possession of a property diminished in value consequent on the negligence of the respondent bank. It is, of course, necessary that the damages claimed to the estate should be attributable to the negligence of the respondent bank, but in this respect there was reasonable evidence on which the jury might found their verdict, and careful direction by the trial Judge. I am not prepared to assume that the jury were misled by not appreciating the different positions of the trustee in bankruptcy and Wilson, or that any confusion under this head would have resulted either in an unfair valuation of the estate at October 31, 1914, or of the debts due to be paid in the bankruptcy. There was in truth no dispute as to the amount of the debts, and the valuation as on October 31, 1914, was obviously considered with great care. The able argument of Mr. Douglas Hogg on behalf of the respondent bank appeared to me to bring every possible point to the attention of your Lordships, but so soon as it is established that there are no assets of value in the hands of the trustee the foundation, on which his argument was founded, is cut away. Having come to this conclusion it is unnecessary for me to dwell on the absence in the notice of appeal to the Court of Appeal of the points relied on before that Court and this House, but I desire to express my entire agreement with the view that where the rules as to the giving of the notice of appeal are not observed, it is only in exceptional cases, and on special grounds, that relaxation should be allowed.

My Lords, I think that the items for loss of income on maltings, for loss of income on farms, and damages to the business and goodwill of the maltings are properly included. If the aggregate amount of damages is large, it must not be forgotten that the appellant Wilson was dependent as to the value of his business and estate on the upholding of his credit, and that he had a constant overdraft at the respondent bank of not much less than the maximum amount to

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Parmoor.

H. L. (E.) which he was entitled to overdraw—namely, 29,000*l.* ; and that
 1919 the figure of the bank's proof in his bankruptcy was largely
 WILSON dependent on the low value which the bank itself placed on
 v. the Arkleton business and property as a consequence of the
 UNITED bankruptcy proceedings.
 COUNTIES
 BANK,
 LD.

My Lords, I have had some difficulty on the item of 7500*l.*
 Lord Parmoor. The jury have found that the respondent bank agreed to take
 all reasonable steps to maintain the appellant Wilson's credit
 and reputation, and that the appellant Wilson could rely
 on the respondent bank to look after his financial affairs,
 but that the respondent bank was guilty of negligence in the
 performance of this duty, and that thereby the appellant
 Wilson's credit was lost. No evidence, however, was given
 of any actual damage, and the question arises whether in such
 a case general damages can be considered. On the whole,
 this case appears to me to come within the same category
 as when a banker having funds to meet a customer's cheque
 dishonours his draft, and where the amount ascertained of
 actual damages could not be, as estimated in money, a fair
 satisfaction for the wrong which the appellant Wilson has
 suffered consequent on the breach of duty by the respondent
 bank. In the case of *Prehn v. Royal Bank of Liverpool* (1)
 Martin B. defined general damages to be such damages as
 the jury may give when the judge cannot point out any
 measure of damages by which they are to be assessed except
 the opinion and judgment of a reasonable man. I think
 that on those lines the verdict for 7500*l.* should not be
 disturbed.

My Lords, in my opinion the appeal succeeds and the
 judgment of Bray J. should be restored with costs in this
 House and in the Court of Appeal.

LORD WRENBURY. My Lords, in this case there arose for
 decision three questions : first, whether there was a contract
 and if so what were its terms ; secondly, whether there was a
 breach ; and, thirdly, what were the damages arising from the
 breach ? The jury found that there was a contract, and found

(1) (1870) L. R. 5 Ex. 92.

what were its terms. They found negligence in performance of the duties under the contract and they assessed the damages at 45,182*l.* 5*s.* 8*d.* The Court of Appeal granted a new trial as to the whole matter. In my judgment justice cannot be done between the parties except by a new trial as ordered by the Court of Appeal. Having regard to the opinions which your Lordships have already expressed it would serve no useful purpose for me to give my reasons at any length. I will but indicate why I reach my conclusions.

Upon the question of contract the judge ought, I think, to have directed the jury as to what is necessary to create in law an obligation binding as between the parties. He did not do so. He ought to have pointed out in clear terms the difference between an obligation resting upon consideration, and a generous offer to assist a man in a difficult position. Had he taken this course I cannot conceive that upon the evidence the jury could have found as they did. Further, as to the terms of the contract, the judge should have called the attention of the jury to the evidence and left it to them to express the exact terms of the contract which they found to exist. The course which the judge took was to propose to the jury a form of words to which they were to answer "Yes" or "No," words which included the enormously sweeping language "take all reasonable steps to maintain the plaintiff's credit and reputation," and again, "undertake the maintenance of his credit and financial affairs." In passing I may say that no one disputes that these findings must be qualified by words which admit that the bank were not liable to make advances beyond the agreed overdraft. But the verdict contains no such words of limitation. The difficulty here is that the defendants' counsel accepted the questions which the judge proposed to put to the jury, and I feel with the Lord Chancellor that however unsatisfactory the result may be, litigants must, to a large extent, be bound by the conduct of their case, even if the result be to give away its merits. I can, however, find no evidence sufficient to support the findings of the jury. I think as regards this part of the case that, however unfortunate may have been the conduct of

H. L. (E.)

1919

WILSON

v.

UNITED
COUNTIES
BANK,
LD.

Lord Wrenbury.

H. L. (E.) the case, the verdict is not supported by the evidence. This
 1919 must I think be the meaning of the first paragraph of
 WILSON v. PICKFORD L.J.'s judgment. He found his way to get over
 UNITED the embarrassing situation which arose from the language
 COUNTRIES into which he condensed the expressions used by the defendants'
 BANK, counsel in opening the appeal before the Court of Appeal,
 L.D. by saying that the case must go down at large for a new trial
 Lord Wrenbury. because it could not be that counsel was admitting that the
 finding of the jury was right.

Upon the question of breach I say nothing. If the jury were warranted in finding the contract which they did, I do not quarrel with their finding the breach.

Thirdly, as to the damages. Upon this part of the case I do not think the jury were properly directed as to the relative positions of Wilson and of Mr. Arter, the trustee, in this matter. The cause of action for negligence had passed to the trustee. I do not think the jury understood this. They were in search as they thought of the amount of the damages sustained by Wilson; they thought this was the point, and their verdict was, I think, based upon the hypothesis that Wilson had lost his assets by reason of the fact that the assets had passed to the trustee and that Wilson was damaged accordingly. Further, and this is a totally different point, they started from the standpoint of a balance sheet in October 1914, and asked themselves what was the value of what Wilson had remaining at the trial and gave him the difference regardless of the question whether the depreciation arose to any and what extent by causes with which the bank had nothing to do, such as depreciation in value by reason of the war. Upon this part of the case I find myself in the satisfactory position of agreeing with my noble and learned friend, Lord Finlay. Upon this question of damages I agree with all that Pickford L.J. said in the Court of Appeal. The damages seem to me quite impossible. The result as Pickford L.J. said is to put Major Wilson in a position about twice as good as he was in on October 31, 1914. But on this question again there is, I think, a difficulty arising from the fact that during the hearing in your Lordships' House counsel at your Lordships' invitation withdrew and

returned in agreement to go again before Bray J. upon the question whether there were further assets in the hands of the trustee whose value had been disregarded. This course involved an admission that subject to this point and to an adjustment of figures the principle upon which the damages had been assessed was not challenged by the defendants. My Lords, I should not myself have thought it necessary to hold the defendants to this as an admission if your Lordships had been of opinion with me upon the general question. It remains, however, that the result of this case arises not so much from the merits of the one party or the demerits of the other as from the manner in which the case was conducted. It is certainly a salutary principle that a Court of justice should confine itself to adjudicating upon the questions raised by the parties litigant to the exclusion of other questions which they do not advance. But like many another principle care must be taken in its application.

Upon the question of the 7500*l.* I do not wish to add anything.

H. L. (E.)
1919
WILSON
v.
UNITED
COUNTIES
BANK,
LD.
Lord Wrenbury.

Order of the Court of Appeal reversed, and judgment of the King's Bench Division restored. The respondents to pay the costs in the Court of Appeal and the costs of the appeal to this House.

Lords' Journals, June 2, 1919.

Solicitors for appellants: *Field, Roscoe & Co., for Ansell & Sherwin, Birmingham.*

Solicitors for respondents: *Rawle, Johnstone & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* JOHNSON APPELLANT ;
 1919
 AND
 Nov. 11. TAYLOR BROS. & COMPANY, LIMITED . RESPONDENTS.

Practice—Writ—Service out of the Jurisdiction—"Contract to be performed within the jurisdiction"—Sale of Goods—C.I.F. Contract—Breach—Cause of Action—Failure to ship—Failure to tender Shipping Documents—Rules of the Supreme Court, Order XI., r. 1 (e).

Leave will not be granted under Order XI., r. 1 (e), to a purchaser of goods under a c.i.f. contract from a foreign vendor to serve notice of a writ of summons on the vendor outside the jurisdiction in an action for breach of contract, where the essential breach on which the action is founded is the failure to ship the goods at the foreign port, upon the allegation of the purchaser that the breach is the failure to tender shipping documents within the jurisdiction.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal affirming an order of Lord Coleridge J. in chambers.

The appellant, a Swedish subject domiciled in Sweden, carried on the business of manufacturing and exporting iron at Stockholm. The respondents were an English limited company carrying on the business of ironfounders at Leeds and of railway tyre and axle makers at Manchester.

By a contract of May 23, 1908, for the supply by the appellant to the respondents according to their requirements of Swedish pig-iron during the years 1908 to 1920 inclusive, the appellant agreed to ship the pig-iron from time to time upon the instructions of the respondents from the Baltic for delivery at Manchester or at Leeds via Hull, on the terms that the pig-iron should be at the risk and account of the respondents from the time of its shipment, and should be invoiced to the respondents at 97s. 6d. per ton c.i.f. Leeds and 93s. 9d. per ton c.i.f. Manchester (subsequently increased to 5l. and 98s. 3d. respectively).

* *Present* :—LORD BIRKENHEAD, L.C., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD BUCKMASTER.

The contract is set out in greater detail in the judgment of the Lord Chancellor. H. L. (E.)

On the refusal of the appellant to make any further deliveries under this contract, the respondents applied for leave under Order XI., r. 1 (e), to serve notice of a writ of summons upon the appellant in Sweden in an action for breach of contract. The application was supported by an affidavit of the respondents' managing director, who stated that the appellant had, in breach of the said contract, failed and neglected (a) to tender any shipping documents to the respondents for any instalments of pig-iron in the year 1916; (b) to make arrangements for inland carriage; (c) to make any deliveries in Leeds or Manchester. Leave was obtained and service was effected accordingly. The appellant applied to set aside the writ and the service thereof on the ground that the breach on which the action was founded was not within the jurisdiction.

1919
JOHNSON
v.
TAYLOR
BROS.
AND
COMPANY,
LD.

Lord Coleridge J. refused the application, and his order was affirmed by the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.).

1919. Oct. 30, 31. *R. A. Wright K.C.* (with him *W. A. Jowitt*) for the appellant. Under an ordinary c.i.f. contract, where the breach upon which the action is founded is the failure to ship the goods, the breach arises at the place of shipment, and, therefore, the case does not fall within Order XI., r. 1 (e), and service out of the jurisdiction will not be allowed: *Tregelles v. Sewell* (1); *Hamlyn & Co. v. Griendisveen Co.* (2); *Comber v. Leyland* (3); *Parker v. Schuller* (4); *Crozier, Stephens & Co. v. Auerbach* (5); *Biddell Brothers v. E. Clemens Horst Co.* (6) per Kennedy L.J., whose dissentient judgment was adopted by this House. Upon the authorities the substantial breach in this case is non-shipment, because if the goods are not shipped no further question arises under this contract. When once the goods are shipped it is essential that the purchaser should have the documents ten-

(1) (1862) 7 H. & N. 574.

(5) [1908] 2 K. B. 161.

(2) (1890) 6 Times L. R. 225, 274.

(6) [1911] 1 K. B. 934, 961;

(3) [1898] A. C. 524.

[1912] A. C. 18.

(4) (1901) 17 Times L. R. 299.

H. L. (E.) 1919
JOHNSON
v.
TAYLOR
BROS.
AND
COMPANY,
LD.
—

dered to him, because that is the final act to be done under the contract ; but unless the goods are shipped there never are any goods in respect of which documents can be tendered. In *Parker v. Schuller* (1) the same point was taken as has been taken by the plaintiffs in this case, namely, that the breach was the non-tender of the shipping documents, and that, consequently, there was a breach within the jurisdiction of a contract which according to its terms was to be performed within the jurisdiction ; but it became unnecessary to decide the point because this breach was not included in the affidavit in support of the application for leave.

Leslie Scott K.C. and *Alexander Neilson K.C.* for the respondents. In *Arnhold Karberg & Co. v. Blythe, Green, Jourdain & Co.* (2) Scrutton J. described a c.i.f. contract as a contract, not for the sale of goods, but for the sale of documents relating to goods. Bankes L.J. criticized this language and preferred to describe the contract as a contract for the sale of goods to be performed by the delivery of documents, but, in substance, he did not differ from the learned judge. Scrutton J. meant that the seller fulfilled his contract by delivery of the documents even though the goods were at the bottom of the sea. In many of these contracts the delivery of the documents plays a very important part, and Order XI., r. 1 (e), contains nothing which imposes upon the Court the duty of inquiring at this stage of the proceedings as to the relative importance of the obligations to be performed without the jurisdiction and those to be performed within the jurisdiction under such a contract. *Rein v. Stein* (3) shows that in order to bring this rule into operation it is not necessary that the whole contract should be performed within the jurisdiction. Where a party repudiates the whole contract, then if part of it is to be performed within the jurisdiction the rule applies. Although in law a c.i.f. contract is as regards shipment a contract which is to be performed outside the jurisdiction, the Courts have recognized that the obligation to tender documents is an obligation to be performed within the jurisdiction, and that

(1) 17 Times L. R. 299.

(2) [1916] 1 K. B. 495, 510.

(3) [1892] 1 Q. B. 753.

that is a term of the contract which justifies leave to serve notice of the writ without the jurisdiction. In *Biddell Brothers v. E. Clemens Horst Co.* (1) Kennedy L.J. approved of Mr. Horridge's argument in *Parker v. Schuller*. (2) And see *C. Sharpe & Co. v. Nosawa & Co.* (3), which shows that the main term of a c.i.f. contract is the delivery of the shipping documents. There are here two breaches : (1.) the failure to ship ; (2.) the failure to deliver documents. The respondents can rely on one or both. One only being open to them under Order XI., they may rely on that. Assuming that the Court has jurisdiction to grant leave to serve notice of the writ out of the jurisdiction, the writ being for breach of contract generally, it may be that, if the only term of the contract to be performed within the jurisdiction were a trivial one, the Court in the exercise of its discretion would refuse leave ; but when leave has been granted it will not readily be set aside on a question of discretion.

R. A. Wright K.C. replied.

The House took time for consideration.

1919. Nov. 11. LORD BIRKENHEAD L.C. My Lords, this is an appeal from an Order of the Court of Appeal dated December 2, 1918, in an action in which Taylor Brothers & Co., Ltd., the respondents, are the intended plaintiffs, and Axel Axelson Johnson, the appellant, is the intended defendant. The appellant carries on business in Stockholm, Sweden, under the style of A. Johnson & Co. The respondents are a limited company duly incorporated and carrying on business at Leeds as ironfounders and steel manufacturers, and at Manchester as railway tyre and axle makers.

The respondents are attempting in this action, the admissibility of which is under debate, to recover damages for alleged breach of a contract of May 23, 1908, as modified by a supplementary contract dated January 5 and 10, 1914. In the view I have formed, your Lordships receive no assistance from the supplementary contract, and the question which requires

(1) [1911] 1 K. B. 934, 962.

(2) 17 Times L. R. 299.

(3) [1917] 2 K. B. 814, 818.

H. L. (E.) decision may be determined by reference to the earlier contract alone.

1919

JOHNSON

v.

TAYLOR

BROS.

AND

COMPANY,

LD.

Lord
Birkenhead L.C.

By that instrument the appellant agreed, on terms to be mentioned presently, to supply to the respondents their requirements of Swedish pig iron from the year 1908 to the year 1920 inclusive. Clauses 5 and 6 of this contract require consideration, and are in the following terms :—

“(5.) Messieurs Taylor Sons and Company Limited will pay to Messieurs Axel Johnson and Company for the said pig iron a maximum price on the basis of ninety-seven shillings and sixpence per ton delivered Manchester Docks without ship canal dues. If the cost of production and delivery on such basis shows a profit to Messieurs Axel Johnson and Company exceeding seventeen shillings and sixpence per ton Messieurs Taylor Brothers and Company, Limited, shall be entitled to a rebate equivalent to such excess of profit. The cost of such production and delivery shall be arrived at as follows :—i.e., to the actual cost of producing the pig iron at the Axmar Iron Works shall be added the interest on the capital of Messieurs Axel Johnson and Company engaged in the business of the said Ironworks, and also all working expenses, as also the cost of delivering the pig iron from the works to the ship, and the freight on the pig iron from the Swedish Port to Manchester at six shillings per ton and to Leeds (as above defined) respectively, and the cost of Insurance, but in any event Messieurs Taylor Brothers and Company Limited shall pay the canal dues at Manchester, which shall not be taken into account. In order to arrive at the amount of the said capital and working expenses the total capital and working expenses in connection with the Axmar Iron Works in each year shall be apportioned pro rata, having regard to the total production of pig iron at the said works during such year and the quantity manufactured for Messieurs Taylor Brothers and Company Limited.

“(6.) The pig iron shall be at the risk and for the account of Messieurs Taylor Brothers and Company Limited from the time of its shipment. The pig iron shall be invoiced to Messieurs Taylor Brothers and Company Limited at ninety-seven shillings and sixpence per ton c.i.f. Leeds, and ninety-

three shillings and ninepence per ton c.i.f. Manchester Docks, and shall be paid for on the basis of such invoices by Messieurs Taylor Brothers and Company's (Limited) acceptances at ninety days against shipping documents or cash month following delivery."

There is nothing at all unusual in the provisions of this contract. It is an ordinary contract for the sale of goods upon cost, insurance, freight, or more shortly c.i.f. terms. Under such a contract, as is well known, the seller undertakes various obligations. He is bound in the first place to ship goods of the contract description on board a ship bound to the contract destination. He is bound in the second place to tender to the purchaser within a reasonable time after shipment the shipping documents, e.g., the Bill or Bills of Lading and a Policy of Insurance reasonably covering the value of the goods. If he neglects to ship goods of the contractual description under the terms of his contract, he is, of course, liable to an action for breach of contract, but if the breach has occurred without the jurisdiction, proceedings are only open to the buyer in the place without the jurisdiction where the breach occurred. I will presently examine the rule which expresses this principle. But before I do so I wish to point out that there is a short yet not particularly simple question to which its application in the present case gives rise, namely, whether, when the seller, having committed a breach of his original obligation to ship the goods, finds himself involved in a consequential breach of his obligation to tender papers, leave should be given to issue a writ without the jurisdiction having regard to the fact that a portion of his obligation, namely, the tendering of papers, ought to have been performed in this country.

I lay it down without hesitation that the tendering of the shipping documents ought in such a case to be made in this country. Long practice, the reason of the thing, and considerable authority, render this conclusion necessary. For my own part I agree with the conclusion expressed by Kennedy L.J. upon this point in *Biddell Brothers v. E. Clemens Horst Co.* (1)

H. L. (E.)

1919

JOHNSON

v.

TAYLOR
BROS.AND
COMPANY,
LD.Lord
Birkenhead L.C.

H. L. (E.) The question which falls to be determined requires careful
 1919 consideration of the language of Order XI., r. 1 (e). The Order
 JOHNSON is as follows :—

 “ (1.) Service out of the jurisdiction of a Writ of Summons
 or notice of a writ of summons may be allowed by the Court
 or a Judge whenever . . . (e) the action is founded on any
 breach or alleged breach within the jurisdiction of any contract
 wherever made, which, according to the terms thereof, ought
 to be performed within the jurisdiction, unless the defendant
 is domiciled or ordinarily resident in Scotland or Ireland.”

 v.
 TAYLOR
 BROS.
 AND
 COMPANY,
 LD.
 —
 Lord
 Birkenhead L.C.

It is evident that the obligation of the shipper, which is at least first in order chronologically, to ship goods of the contractual description, is not a contract which, according to the terms thereof, ought to be performed within the jurisdiction. The respondents nevertheless in this case apparently attempted in the first place to institute proceedings in this country in respect of such breach. Such an attempt was not made for the first time, and Kennedy L.J. in the admirable judgment to which I have already referred, describes how the present Mr. Justice Horridge, when at the Bar, anticipated in *Parker v. Schuller* (1) with entertaining uniformity the litigious tactics of the respondents to the present appeal. His clients, like the present respondents, originally attempted to take proceedings in this country, on the ground that the non-delivery of the goods here constituted a breach of the contract within the jurisdiction. In the Court of Appeal Mr. Horridge attempted with great ingenuity, and so far as I know for the first time, to substitute the contention that buyers could under the circumstances indicated establish jurisdiction against sellers in this country, by commencing proceedings in respect, not of the fundamental breach, namely, of the undertaking to ship, but of the consequential breach of the undertaking, namely, to render shipping documents within the jurisdiction. Neither the writ of summons in *Parker v. Schuller* (1), nor the cause of action alleged in the affidavit, permitted such a variation of the grounds upon which leave to issue the writ and to serve notice thereof out of the jurisdiction had been granted. The

(1) 17 Times L. R. 299.]

contention was, therefore, not examined upon its merits, and it becomes necessary for your Lordships to examine and decide it to-day.

It is convenient to reach a conclusion at the outset upon the general policy of the Legislature in framing the provisions of Order XI., r. 1 (e). And indeed that policy can be little open to doubt. The Legislature intended to prohibit the service of Writs out of the jurisdiction in actions for breach of contract unless, according to the terms of the particular contract, it ought to be performed within the jurisdiction. Ought then the contract, of which I have already set out the material terms, according to those terms to have been performed within the jurisdiction? It is, as I have pointed out, evident that the undertaking to ship is not a contract which according to its terms ought to be performed within the jurisdiction. The respondents have themselves abandoned that contention. But they make a further submission: they contend that the second obligation of the appellant, namely, that of tendering shipping documents in the jurisdiction, has been broken, and that this contract at any rate is plainly one which according to its terms ought to be performed within the jurisdiction. In support of this contention they appeal to the high authority of Lindley L.J., who said of a similar Order, in *Rein v. Stein* (1): "I will make another observation on the construction of Clause (e) of Order XI., r. 1. I do not understand that it is the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction."

I understand the Lord Justice, in making that observation, to have in mind a case where a contract involves distinguishable and independent obligations, some of which under its terms require implement without, and others within, the jurisdiction. In such a case that general policy of the law upon which I have already insisted would be abundantly satisfied by giving effect to the view indicated by Lindley L.J. But does such a case as that which I have supposed even remotely

H. L. (E.)

1919

JOHNSON

v.

TAYLOR

BROS.

AND

COMPANY,

LD.

Lord
Birkenhead L.C.

(1) [1892] 1 Q. B. 757.

H. L. (E.) resemble that which your Lordships have to decide? Here
 1919 the fundamental breach is in limine. The real complaint of
 JOHNSON the respondents against the appellant is that he did not,
 v. according to his contract, put on board ship the goods which
 TAYLOR he had contracted to sell. It is ludicrous to suppose that
 BROS. their substantial complaint lies in the withholding of paper
 AND symbols which could have no meaning, and which indeed could
 COMPANY, have no existence, when once the original breach had been
 LD. committed. It is not disputed that the procedure now
 Lord defended was in the history of this case an after-thought. It
 Birkenhead L.C. was not seriously disputed that the course adopted was a
 device, believed to be within the law, by which the appellant
 could be made amenable to the jurisdiction for one purpose,
 and thereafter kept amenable for all purposes.

I am of opinion that the observations of Lindley L.J. are well founded in relation to the facts which elicited them. But the "part of the contract" which is to be performed within the jurisdiction must be a part which according to the tenour of its terms is susceptible of individual performance in this country, independently of the fate of other and distinguishable parts of the contract. The observation in my view does not apply and was not intended to apply to a case where that which was to be performed without the jurisdiction was of such a nature that its breach so destroyed the substratum of the whole contract that no performance was or could conceivably be possible of "the part of the contract" which, if matters had pursued a normal course, would have been performed in this country. It is, in other words, not permissible in such a case to found proceedings within the jurisdiction upon part of a contract which is ancillary to another part in this sense at least, that the breach of that other part necessarily involves its own destruction. It may be observed that Lindley L.J. in a later passage of the same judgment adds (1): "So here, all the duties of the defendant under his contract, except the duty of paying the plaintiffs, were to be performed abroad; he was to sell abroad, but the most important part of all was payment, and that payment was to be made here."

(1) [1892] 1 Q. B. 757.

My Lords, I have reached the conclusion that your Lordships ought not to sanction such an attempt. I found my conclusion upon the broadest possible grounds, that is to say, upon the reason and policy of the Order under consideration. But it is not unimportant in this connection to notice that the Order gives a discretionary authority: "Service *may* be allowed by the Court or a Judge. . . . " The real nature of the attempt made in the present case to found jurisdiction has, I hope, been analysed sufficiently in the foregoing observations to satisfy your Lordships that this appeal must succeed.

I am of opinion, for the reasons given above, that the judgment of the Court of Appeal cannot be supported, and I move your Lordships that it be reversed with costs.

VISCOUNT HALDANE. My Lords, I have had the advantage of reading beforehand the judgment just delivered by my noble and learned friend on the Woolsack, and I concur in its conclusions.

I desire to add only a few words. Order XI., r. 1, does not lay down in imperative terms a new principle of law as to be applicable in all cases. What it does is, while leaving intact the old principle that by the law of England jurisdiction depends, broadly speaking, on presence within the jurisdiction, to enable the Court to give special leave for service out of the jurisdiction in certain circumstances. The Court may do so, that is to say that the Court has a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for. This appears to me to entitle the Court to refuse to give such leave in an instance in which the proceeding, though for a breach within the jurisdiction and in the letter within the terms of the rule, is in substance not so. For the reasons given by your Lordship on the Woolsack I think that the alleged breach of contract under consideration is one which is merely a consequential and unavoidable incident of a substantial and real breach which took place only outside the jurisdiction. The proper mode of exercising the jurisdiction which this rule confers is therefore that the Court

H. L. (E.)

1919

JOHNSON

v.

TAYLOR

BROS.

AND

COMPANY,

LD.

Lord
Birkenhead L.C.

H. L. (E.) should decline to exercise its power. This interpretation of the new and exceptional power gets rid of difficulties which would often be great if the only question were whether there has been any breach at all within the jurisdiction.

1919
JOHNSON
v.
TAYLOR
BROS.
AND
COMPANY,
LD.

LORD DUNEDIN. My Lords, as this is purely a question of English procedure, I should not have thought it right to express an opinion contrary to that held by the majority of your Lordships. But as your opinions coincide with the view which naturally commends itself to me, it may not be improper that I should add a few words as to how the question strikes me.

In the first place—and here I am entitled to give my opinion as freely as any of your Lordships—I hold that none of the cited authorities conclude the present point.

I think it is legitimate to begin by considering the genesis of the rule. I understand that jurisdiction according to English law is based on the act of personal service and that if this is effected the English law does not feel bound by the Roman maxim "*Actor sequitur forum rei*." It is far otherwise in other systems where service is in no sense a foundation of jurisdiction, but merely a *sine qua non* before effective action is allowed. Now service being the foundation of jurisdiction, it follows that that service naturally and normally would be service within the jurisdiction. But there is an exception to this normal rule, and that is service out of the jurisdiction. This however is not allowed as a right but is granted in the discretion of the judge as a privilege, and the rule in question here prescribes the limits within which that discretion should be exercised. The spirit of the rule I take to be that, when what the plaintiff wishes really to complain of is the non-performance of something which the defendant ought to have performed within the jurisdiction according to the proper interpretation of the contract, he should be allowed to try that question here, notwithstanding that there might be some other acts which the defendant ought to have performed abroad. It seems to me to follow that there must be substance in the breach.

Lord Lindley said in the case of *Rein v. Stein* (1), quoting with approval an earlier dictum of Cotton L.J., that you must look at the whole circumstances to determine whether the contract was one that ought, according to the terms thereof, to be performed within the jurisdiction. In like manner I think we must look at the circumstances to see what is the breach alleged, and whether that breach is substantial.

Turning now to the present case, what is it that the plaintiff really complains of? It is that the ore was not shipped in order to be forwarded. That is the gist of the whole matter. The non-tender of the shipping documents might have constituted a breach if the ore had been shipped, but when the ore was not shipped, no shipping documents could be called into existence, and the breach of non-tender was, so to speak, swallowed up by the prior breach of non-shipment. Supposing the defendant had been found personally in London and served, would the plaintiff have ever alleged as a breach the non-tender of non-existing shipping documents? Of course he would not. He would have alleged the breach of not shipping the ore. Yet in this case, if he had said that, then according to the decisions, he would not have got leave to serve under the rule. The present way of putting his case comes therefore in my view to be a mere device to allege a breach, not to seek damages for that breach, but to be allowed to convene the defendant and complain of a breach which, if alleged, would not have provided foundation for a service within the jurisdiction.

I am glad therefore to be able to say that I agree with the motion made by your Lordship, not as bowing to authority, but as moved by conviction that the motion is right.

LORD ATKINSON. My Lords, the authorities I shall presently cite establish clearly, I think, that when a vendor and purchaser of goods situated as they were in this case enter into a c.i.f. contract, such as that entered into in the present case, the vendor in the absence of any special provision to the contrary is bound by his contract to do six things. First, to make out an invoice of the goods sold.

(1) [1892] 1 Q. B. 753.

H. L. (E.)

1919

JOHNSON

v.

TAYLOR

BROS.

AND

COMPANY,

LD.

Lord Dunedin.

H. L. (E.) 1919
 JOHNSON
 v.
 TAYLOR
 BROS.
 AND
 COMPANY,
 LD.
 Lord Atkinson.

Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price. These authorities are *Ireland v. Livingston* (1) per Blackburn J.; *Biddell Bros. v. E. Clemens Horst Co.* (2); on appeal *E. Clemens Horst Co. v. Biddell Bros.* (3); and *C. Sharpe & Co. v. Nosawa Co.* (4) These cases also establish that if no place be named in the c.i.f. contract for the tender of the shipping documents they must *prima facie* be tendered at the residence or place of business of the buyer. In a case such as the present, where the goods purchased were bought from a foreign seller and were to be shipped in a foreign country, it cannot, I think, be doubted that a breach of the express or implied term of the contract that the shipping documents should be tendered to the purchaser within the jurisdiction of the English Courts, would enable a Court or judge, on the application of the purchasers, to make an order under Order XI., r. 1 (e), for the service outside the jurisdiction of a writ of summons in which the cause of action was stated to be the non-tender of these shipping documents. In such a case the breach of contract relied upon would be a breach within the jurisdiction of a term of the contract which ought to be performed within that jurisdiction. In *Rein v. Stein* (5) goods had been by an English merchant sold and delivered to a foreign merchant, but no place was named for the payment of the price. It was held that the price was properly payable to the vendor in England, that its non-payment constituted a breach within the jurisdiction of a term of a contract

(1) (1871) L. R. 5 H. L. 395, 403.

(3) [1912] A. C. 18.

(2) [1911] 1 K. B. 934, 962.

(4) [1917] 2 K. B. 814.

(5) [1892] 1 Q. B. 753.

which ought to be performed within the jurisdiction within the meaning of this Order, and that the vendor was therefore entitled to apply to have a writ of summons claiming payment of the price served out of the jurisdiction. Though these were the precise points decided in that case Lindley L.J. took occasion to express a very decided opinion on the construction of this Order XI., r. 1 (e). He first quotes Cotton L.J. (1): "The question we have to consider is this, What is the meaning of 'which according to the terms thereof ought to be performed within the jurisdiction'? It was said by the appellant to mean that it must be an express term of the contract that it should be performed within the United Kingdom. In my opinion, that is not the true construction. The difficulty arises from the words 'according to the terms thereof'; but in my opinion those words mean that you must look at the time when the contract was made, and then determine whether, having regard to the terms, the contract was one which ought to be performed within the jurisdiction, and do not mean that there must be an express provision that the contract is to be performed within the jurisdiction." Then Lord Lindley proceeds to say: "Now, before I part with that case, I will make another observation on the construction of Clause (e) of Order XI., r. 1. I do not understand that it is the whole of the contract that has to be performed within the jurisdiction. It is sufficient if some part of it is to be performed within the jurisdiction, and if there is a breach of that part of it within the jurisdiction; and that was the view taken by the Divisional Court in *Robey v. Snaefell Mining Co.* (2), where the action was brought by a firm of engineers in Lincoln for the price of machinery erected in the Isle of Man. No definite place for payment was specified in the contract; but the Court came to the conclusion that one of the terms of the contract was that payment should be made in Lincoln, and, therefore, they gave leave to issue the writ. So here, all the duties of the defendant" (i.e., the buyer) "under his contract, except the duty of paying the plaintiffs" (i.e., the sellers), "were to be performed abroad." Kay L.J. concurred.

H. L. (E.)

1919

JOHNSON

v.

TAYLOR

BROS.

AND

COMPANY,
LD.

Lord Atkinson.

(1) [1892] 1 Q. B. 757.

(2) (1887) 20 Q. B. D. 152.

H. L. (E.) 1919
 JOHNSON
 v.
 TAYLOR
 BROS.
 AND
 COMPANY,
 LD.
 Lord Atkinson.

The case of *The Eider* (1) is to the same effect. There the payment was due to a Swedish company for salving a German vessel aground within the three miles limit of the English coast under a contract made in the Isle of Wight by the master of the German ship in which contract the place where payment was to be made was not stated. It was held first by Sir F. Jeune, and afterwards by the Court of Appeal, that as the payment was not to be made in England a writ of summons to recover it could not be served out of the jurisdiction. In *Reynolds v. Coleman* (2) the construction put upon Clause (e) of Order XI., r. 1, by Lindley L.J. in *Rein v. Stein* (3) was adopted, and in *Bell & Co. v. Antwerp, London and Brazil Line* (4) the decision is practically to the same effect. Upon those authorities it seems to me clear that if the sellers in the present case had shipped the goods sold, and had failed to tender the shipping documents in England to the purchaser, then apart from any question as to the course of business to which I shall presently refer, a writ of summons claiming damages for the non-tender and delivery of these documents would come within the words of this clause (e) of Order XI., r. 1. But here the seller has in breach of his agreement failed to ship the goods. By doing so he has made the creation, and of course the tender, of the shipping documents impossible. That is a necessary but collateral consequence of the main and substantial breach of his contract. Still, though this be so, I think a Court in this country would in strictness have jurisdiction to order a writ of summons claiming damages for the non-tender of the shipping documents to be served out of the jurisdiction. But the jurisdiction conferred upon the Court by this Order is discretionary, not mandatory. The words of rule 1 are—"service may be allowed by a Court or a Judge." In the present case I think in the exercise of that discretion an application for an Order to serve a Writ out of the jurisdiction should be refused, on the grounds that the real and substantial cause of action, failure to ship the goods, arose outside the jurisdiction, and that this trivial consequence

(1) [1893] P. 119.

(2) (1887) 36 Ch. D. 453.

(3) [1892] 1 Q. B. 753.

(4) [1891] 1 Q. B. 103.

of that breach, the non-tender of the shipping documents, should not be made the means of instituting litigation in this country against a foreigner. On that ground I think the Order appealed from should not have been made.

As to the course of business I think that the respondents having, by a term of their contract, a legal right to have the shipping documents tendered to them in England, they could not lose that right by adopting a course of business according to which the transmission of these documents by post to them was accepted by them as equivalent to a proper tender. It is not stated that according to this course of business the documents, if lost in the post, were treated as if they had been received. In the present case the documents were not and could not be posted, as they never existed. The appellant was not, in my view, released in any way from his obligation to tender the shipping documents in England by this course of business. I think the appeal should be allowed and the decisions of Lord Coleridge J. and the Court of Appeal be reversed and the Order giving liberty to issue the writ of summons against the defendant be set aside.

H. L. (E.)

1919

JOHNSON
v.
TAYLOR
BROS.
AND
COMPANY,
LD.

Lord Atkinson.

LORD BUCKMASTER. My Lords, the material question in this case appears to have been decided in the Court of Appeal in accordance with a case which is referred to as the case of Fuerst. There is no report of this authority, but it is accepted by Mr. Wright on behalf of the appellant as concluding the question against him so far as the Court of Appeal is concerned. This circumstance is unfortunate. We have not before us the judgment of the Court of Appeal in that case and, in the present instance, both Bankes L.J. and Scrutton L.J. accept the authority without investigation. The judgments, therefore, of the Court of Appeal afford us no assistance, for they deal with propositions all of which are, in my opinion, well established and which there is no reason to challenge; they need, however, to be carefully borne in mind in deciding this appeal, and for the sake of clearness I will repeat what I understand those propositions to be. First: In a c.i.f. contract in the form before us, there are two obligations cast

H. L. (E.) upon the vendors—the one is to place the goods upon the vessel at the foreign port and the other to forward the shipping documents to the purchasers. Secondly: The latter obligation is, in a contract in the present form, an obligation to be performed within the jurisdiction. And finally, the rights of the purchaser in this latter respect are not varied by reason of the vendors having continuously discharged their duties without protest by posting the documents abroad. The only further material consideration is that the vendor has absolutely declined to carry out his bargain; he has refused to ship the goods, and consequently he must have refused to deliver the documents. In these circumstances he has, among other breaches, committed within the jurisdiction a breach of a term of the contract which ought to be performed within this jurisdiction. It does not, however, follow from this that the plaintiffs are entitled to obtain leave to issue a writ against him for service out of the jurisdiction.

1919
JOHNSON
v.
TAYLOR
BROS.
AND
COMPANY,
LD.
—
Lord
Buckmaster.

It is not necessary to consider again the wording of the rule. Its effect is stated in the case of *Rein v. Stein* (1), and the Courts have consistently followed that decision, as meaning that, if any part of the contract is to be performed within the jurisdiction, the breach of that part brings into play the operation of the rule. Accepting this principle, there still remains the duty of examining whether this breach is the real matter of dispute. In the present instance the refusal to ship the goods is in my opinion the whole of the breach. Unless and until the goods are shipped, the shipping documents cannot come into existence, and refusal to tender such documents is consequent upon the refusal to put the goods on board. It is perfectly true that without the documents the title to the goods is not complete, that delivery is not effected, and it may be that in an action for non-delivery of the documents the measure of damage would be the same as that for non-delivery of the goods. It must, however, be remembered that the issue of the writ, even in a case within the words of the rule, can only be made by leave of the Court, and in granting such leave regard ought to be had to the real breach in

(1) [1892] 1 Q. B. 753.

respect of which the action is brought, and not merely to a breach on which it is necessary to rely, not to obtain relief, but only to found jurisdiction under the rule. In the present case the plaintiffs' complaint is in reality against refusal to ship, and the delivery of the documents is only essential to make effectual something which has never taken place. In such circumstances to assign refusal to comply with the obligation to tender the documents as the real cause of the action is to push a contention that is contrary to the common experience of proceedings for breach of such a contract. Unless the question of service out of the jurisdiction arose, it is almost impossible to imagine that an action in such a case as the present would be raised solely and specially upon refusal to hand over the documents.

In these circumstances, I find myself unable to accept the view that the case is one in which a judge who exercises the power conferred under Order XI., r. 1, should direct that the writ should be served out of the jurisdiction.

Order of the Court of Appeal reversed, and order of Coleridge J. giving leave to issue and serve notice of the writ of summons, and also the said writ of summons and the notice of the said writ, set aside. The respondents to pay the costs in the Courts below, and also the costs of the Appeal to this House.

Lords' Journals, Nov. 11, 1919.

Solicitors for the appellant : *Botterell & Roche.*

Solicitors for the respondents : *Vincent & Vincent, for Peckover, Scriven & Co., Leeds.*

H. L. (E.)
1919
JOHNSON
v.
TAYLOR
BROS.
AND
COMPANY,
LD.
—
Lord
Buckmaster.

risk. Further the dock was of no value whatever and the appellants could not honestly insure as agreed.

E. P. Davis K.C. and *Hon. M. Macnaughten K.C.* for the respondents. The allegations of fraud were rejected by both Courts in British Columbia. The appellants are liable for 75,000 dollars' damages for breach of the agreement to insure. They were bound to insure upon a valued policy for that sum: *Herring v. Janson*. (1) The loss was due to a marine risk—namely, the fortuitous incursion of sea water. If the loss was not a marine risk as applied to a sea-going ship, it was a marine risk as applied to the dry dock and within the meaning of "marine risk" as used in the agreement. The words as there used included the risk of employing the dry dock in the manner contemplated, fitness for that purpose being admitted. [Reference was also made to *Davidson v. Burnand* (2); *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (3); *Wilson, Sons & Co. v. Owners of Cargo per the Xantho* (4); *Hamilton, Fraser & Co. v. Pandorf & Co.* (5)]

S. S. Taylor K.C. replied.

July 24. The judgment of their Lordships was delivered by

LORD BUCKMASTER. Two appeals are brought in this case: the one by the appellants, seeking to reverse the judgment of the Court of Appeal of British Columbia awarding against them and in favour of the respondents the sum of 44,500 dollars, as to 10,000 dollars for rent of a dry-dock, and as to 34,500 dollars as damages for breach of contract; the other by the respondents asking to increase the amount awarded to the sum of 85,000 dollars, thereby restoring the judgment of the trial Judge, who decreed that sum in their favour.

The appellants in the principal appeal are contractors in a large way of business, and, in May of 1914, they were engaged in the construction of a breakwater in the harbour of Victoria, British Columbia, for the Dominion Government. In order

J. C.
1919
GRANT,
SMITH AND
COMPANY
AND
MCDONNELL,
LD.
v.
SEATTLE
CONSTRUC-
TION
AND
DRY DOCK
COMPANY.

(1) (1895) 1 Com. Cas. 177.

(3) (1887) 12 App. Cas. 484.

(2) (1868) L. R. 4 C. P. 117.

(4) (1887) 12 App. Cas. 503.

(5) (1887) 12 App. Cas. 518.

J. C.
1919
GRANT,
SMITH AND
COMPANY
AND
MCDONNELL,
LD.
v.
SEATTLE
CONSTRUCTION
AND
DRY DOCK
COMPANY.

to carry out this work it was determined to construct the foundation by concrete caissons, the dimensions of which, according to the appellants' statement, were to be 30 feet high, 80 feet long, and 40 feet wide, the weight being 2,300 tons. To place these in position the appellants proposed to employ a floating dry-dock on which the caissons were to be built, two at a time, the dry-dock being then submerged sufficiently to allow the caissons to float off, when the dry-dock would be raised and the operation recommenced.

The respondents, the Seattle Construction Co., possessed a dry-dock which appeared suitable for the operation. It was 325 feet long with 100 feet beam and 14 feet depth. Upon each side, and running its full length, were walls 10 feet wide and 30 feet high, with machinery for admitting and excluding the water and operating the dock. It was made of wood and had been in use since the day of its construction in 1893, having been purchased by the respondents in July, 1913. Negotiations for the hire of this dock took place in April, 1914, between Mr. Paterson, the president of the respondent company, and the appellants' manager, Mr. Bassett. In the end these negotiations resulted in the grant of a lease from the respondents to the appellants of the dry-dock for a period of two years at a rental of 15,000 dollars per annum, payable monthly in advance. The lease was dated May 20, 1914, and as the whole dispute depends upon the measure of the obligation thereby accepted by the appellants, it is desirable to set out in full the relevant clauses.

These are clauses numbered 2, 3, 4, 6 and 7: "2. The lessee will take delivery of said dry-dock at the plant of said lessor in Seattle, Washington, and for the purpose of this lease, the seaworthiness of said dry-dock, and its fitness for the work contemplated by said lessee, are hereby admitted by the lessee. 3. The lessee agrees to have said dry-dock insured for the benefit of said lessor in some company or companies satisfactory to the lessor, in the sum of not less than 75,000 dollars, against both marine and fire risks, and to pay the premiums on such insurance and keep the same in full force during the term of this lease, or of any extensions thereof.

4. Said dry-dock shall be used by the lessee in its construction work on caissons and other similar work, at or near Victoria, British Columbia. Said dry-dock shall not be used by said lessee, nor shall such use be permitted by it, in dry docking for ship repair work or other similar work in competition to the business of the lessor or other companies engaged in similar business. 6. The lessee further covenants to redeliver said dry-dock to said lessor at its plant in Seattle, Washington, upon the termination of this lease, in as good condition as the same was in at the time of its delivery to said lessee hereunder, except for natural wear and tear. 7. In the event said lessee makes default in the payment of said rent, or any part thereof, as the same becomes due and payable under the terms hereof, or makes default in any of the other covenants or obligations of the lessee hereunder, then said lessor shall have the right to retake possession of said dry-dock and terminate this lease, but without prejudice to its right to recover from said lessee rentals for the entire term, and all damages, sustained by the lessor by such breach or breaches of the covenants of the lessee herein."

It was intended to use the dry-dock in the Esquimalt harbour, part of the harbour of Victoria, but not in the Royal Roads. It is stated by the appellants, and not disputed, that this harbour is a harbour of particularly quiet water, and very favourable for the work that was contemplated.

Delivery was given of the dock at Seattle, it was successfully navigated from Seattle to the harbour ; but the contemplated insurance was never effected, and without its protection the appellants proceeded to use the dock in connection with their operations. For this purpose they built a further structure in the form of a gantry on each side of the walls of the dock, and placed upon this structure a travelling crane. The first two of the caissons were then built one on each side of the dock ; owing to their weight there were signs that the timbers in the centre of the dock were giving way and rising under the pressure—a difficulty which the appellants remedied by placing in the centre some 819 tons of gravel. Further difficulties seem also to have occurred owing to the sagging of the transverse

J. C.
1919
GRANT,
SMITH AND
COMPANY
AND
McDONNELL,
LD.
v.
SEATTLE
CONSTRUC-
TION
AND
DRY DOCK
COMPANY.

J. C.
1919
GRANT,
SMITH AND
COMPANY
AND
MCDONNELL,
LD.
v.
SEATTLE
CONSTRUC-
TION
AND
DRY DOCK
COMPANY.

struts in the hull. But it is unnecessary to consider these matters in detail. On January 31, 1915, the process of submerging took place under the charge of Mr. Kennedy—an expert operator who had worked on the dock before its transfer to the appellants.

This operation appears to have begun successfully, but ended in disaster. For some reason that it is not easy exactly to define, the dock listed as it went down. The uppermost wall, which was thus inclined at an angle, broke off. The whole success of the operation was destroyed and the dock lost beyond hope of recovery.

In these circumstances the respondents, on September 2, 1915, took proceedings to recover against the appellants the rent due under the lease, and claiming 150,000 dollars damages for loss of the dock, or, alternatively, 75,000 dollars for breach of the covenant to insure. They based their claim largely upon the alleged negligent use by the appellants, and they did not in terms rely upon the claim for redelivery of the dock at the end of the term—an omission no doubt explained by the fact that the term had not expired by effluxion of time when the proceedings began.

The main answer of the appellants was based upon a charge of fraud against Mr. Paterson. They said that he had falsely and fraudulently represented the capacity of the dock and the use to which it had formerly been put, and further that with a dishonest purpose he concealed from them material facts which, in the circumstances, it was his duty to disclose. This charge was expressly negatived by the learned judge who heard the evidence, and stated his opinion in these words: "I have no hesitation in saying that Mr. Paterson's statement about the dock's capacity and the likelihood of her doing the proposed work, were the honest statement of belief actually entertained by him at the time, and in fact strongly adhered to at the trial." This question was again investigated by the Court of Appeal, who supported the finding in this respect of Clement J. Galliher J.A. said: "I am unable to find fraud. The evidence to establish fraud should be clear and convincing, and I cannot say that this is so." And with

his judgment Martin J.A. agreed. McPhillips J.A. took the same view, and expressed his conclusion as follows : " The appellants laid fraud in the case, and evidence was laid to support this ; but it was not found by the learned trial Judge, and I entirely agree with the learned judge." These opinions were not merely an echo of the judgment of Clement J. They depended upon the complete review of the evidence and a careful and new investigation of all the circumstances. It would be contrary to the established practice of this Board—a practice based upon principles designed to secure finality in litigation and to promote the ends of justice—to reinvestigate a question of this description, when a man has successfully defended his honour and character before his own Courts.

The counsel for the appellants fairly recognized this difficulty, but sought to avoid it by asking their Lordships' attention to further evidence which was not placed in argument before either of the Courts. The concession of the respondents that this evidence might be seen enabled the appellants to avail themselves of its use. Apart from such concession, their Lordships would have been compelled to reject its admission. The concession, though generous in form, was of little value to the appellants in substance. The further evidence upon which he relied consisted merely of an entry in a book to the effect that an attempt made on March 13, 1914, to dock a vessel known as the *A. G. Lindsay* had failed. It had been stated at the trial that this record had been lost, and the appellants asserted that they had only discovered it in the respondents' office after the hearing. Whatever weight that assertion might have possessed had it been urged as a reason for rehearing, it cannot influence their Lordships' mind in determining the value of the evidence which they are called upon to examine. It amounts to nothing beyond the fact that, for a reason unknown, under circumstances unexplained, an attempt on a particular day to use the dock for the *A. G. Lindsay* had failed. Such a statement is wholly insufficient to cause a review of the charge of fraud. With the failure of this charge all complaint as to the stability and utility of

J. C.

1919

GRANT,
SMITH AND
COMPANY
AND
McDONNELL,
LD.

v.
SEATTLE
CONSTRUCTION
AND
DRY DOCK
COMPANY.

J. C.
1919
GRANT,
SMITH AND
COMPANY
AND
McDONNELL,
LD.
v.
SEATTLE
CONSTRUC-
TION
AND
DRY DOCK
COMPANY.

the dock for its contemplated purpose ends, since clause 2 not only negatives any suggestion of a warranty of fitness, but makes the appellants themselves admit that it was fit.

The rest of the appellants' case depends upon the argument that, as the term had not expired, the time for redelivery of the dock had not arisen at the date of the writ, and it was therefore impossible to claim damages for its loss. If the claim of the respondents depends merely upon a covenant to deliver at the expiration of the lease by effluxion of time, this contention ought, in their Lordships' opinion, to prevail.

The statement of claim was not, and could not have been, based upon any breach of a covenant so construed, nor could amendment remedy this defect. But their Lordships do not think that it need be so regarded. It is admitted that the dock is lost past recovery; it is also established that the appellants have not paid the rent due under the lease, nor have they effected the insurance provided by clause 3. These breaches gave the respondents the right to retake possession of the dock and terminate the lease; and though no actual attempt to take possession was made, the institution of these proceedings, with a claim for rent up to the writ and subsequent damages, is in itself sufficient evidence of the lessors' intention in this respect.

The appellants have not, indeed, suggested that the lease is still on foot; nor, even if it were possible to establish that position, could it have been done without payment of the rent and repair of the breach of the broken covenant to insure. So regarded, the covenant for redelivery has arisen and might have been properly included in the statement of claim though the form leaves much to be desired in this respect. The substance to which their Lordships look is, however, a claim for the value of something that has been lost in circumstances rendering the appellants contractually responsible for its value, and this can be maintained. Though the judgment of McPhillips J.A. in the Court of Appeal is not, as reported, quite clear upon this matter, it appears that this was its true effect. He says: "As to the rent, it cannot be allowed for a longer period than up to the time of the commencement

of action, the respondent then electing to have damages assessed as of that date (the action was brought before the expiry of the demise)." And with this conclusion their Lordships agree. The judgment of Galliher J.A., with which the Chief Justice agrees, is confined to the question of value and to the construction of the covenant to insure, and this can be better dealt with in considering the merits of the cross-appeal.

This cross-appeal challenges the judgment of the Appeal Court on two grounds: the one, that the value of the dock, placed at 35,400 dollars, is insufficient; and the other, that the covenant to insure was broken, and that its breach resulted in the loss of the total 75,000 dollars.

Upon the first point all the judges in the Court of Appeal are in agreement as to the value. Their judgments depend upon the fact that Mr. Paterson, on behalf of the appellants, on May 1, 1914, made for the purpose of Customs an affidavit as to the value, stating that to the best of his knowledge and belief the value of the floating dry-dock was 34,500 dollars. Attempts were made to explain that this affidavit was given for the purpose of Customs, so that the value would consequently be only modestly estimated. Such arguments naturally found no favour before the Court of Appeal, and cannot prevail before their Lordships.

There remains only the question raised by the respondents as to the breach of the covenant to insure. That it is broken is common ground. The respondents say, first, that it was impossible of performance; and secondly, that had it been effected, it would not have covered the loss.

With regard to the impossibility of its performance few words need be said. There is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification such a statement is not accurate; and indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule. But it is unnecessary to examine this matter, since no question of impossibility can arise in the present case. The appellants

J. C.
1919
GRANT,
SMITH AND
COMPANY
AND
MCDONNELL,
LD.
v.
SEATTLE
CONSTRUCTION
AND
DRY DOCK
COMPANY.

J. C. did indeed attempt to obtain a policy of insurance, and they failed to do so, largely owing to the fact that the additional structure which they added to the dock caused the insurance company to decline ; but there is nothing to show that higher rates would not have effected the insurance, and the covenant contains no limitation to suggest that insurance is only to be effected at the current premium.

1919
GRANT,
SMITH AND
COMPANY
AND
McDONNELL,
LD.
v.
SEATTLE
CONSTRUC-
TION
AND
DRY DOCK
COMPANY

It is then urged that the policy was only intended to cover the risks by voyage from Seattle to Victoria and any other journeys by sea which, in the course of their use of the dock, the appellants thought fit to make. Their Lordships do not accept this view of the covenant. It must be read in connection with the subject-matter of the lease and the terms in which it is framed. The subject-matter of the lease was undoubtedly a dock, which it was contemplated by both parties was to be used in the Victoria harbour, and though it might have been possible that it could have been taken elsewhere, yet the terms of the covenant, which provide that the insurance shall be kept on foot throughout the whole period of the lease, and not merely effected from voyage to voyage, in their Lordships' opinion negative the view that it was only against risk in its journeyings by sea that the insurance was to be taken out. There is no statement in the covenant as to the form of policy that is to be used ; it must, therefore, be assumed to be an ordinary policy applicable to such a structure both in course of transit and in course of use. It was to insure against " marine risk," which cannot be better described than as against " the hazards of the sea." If while in dock, either while the caissons were being built or while the dock was being submerged, owing to any marine risk the dock had been lost, this loss the policy would have covered ; but, in truth, no such risk or peril caused its destruction. The harbour was peculiarly quiet, and it is plain that it was no conditions of wind or wave that caused the dock to capsize. It was destroyed because of its own inherent unfitness for the use to which it was put—an unfitness which the appellants have prevented themselves from raising by reason of their own covenant.

It is not desirable to attempt to define too exactly a "marine risk" or a "peril of the sea," but it can at least be said that it is some condition of sea or weather or accident of navigation producing a result which but for these conditions would not have occurred. To use the words of Lord Herschell in *Wilson, Sons & Co. v. Owners of Cargo per the Xantho* (1): "I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. . . . There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure." The words there occurred in a bill of lading, and the claim arose with regard to the loss of goods covered by the document. But Lord Herschell points out that the phrase has no different meaning whether it occurs in the insurance of the ship or of the goods.

In the case of *E. D. Sassoon & Co. v. Western Assurance Co.* (2) a store of opium was lost in a hulk moored in a river by the percolation of water through a leak caused by the rotten condition of the boat. The decay was so covered by copper sheathing that, although the vessel was properly inspected, it was not, and it could not, be detected. It was held by this Board that the loss was not a loss within the phrase "perils of the sea and all other perils," and Lord Mersey, in delivering the opinion of the Board, states: "There was no weather, nor any other fortuitous circumstance, contributing to the incursion of the water; the water merely gravitated by its own weight through the opening in the decayed wood and so damaged the opium. It would be an abuse of language to describe this as a loss due to perils of the sea." Their Lordships can see no difference between the circumstances of this case and the principle there enunciated. It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water. In such a case recovery under the ordinary policy of insurance would be impossible. An insurance against

J. C.
1919
GRANT,
SMITH AND
COMPANY
AND
McDONNELL,
LD.
v.
SEATTLE
CONSTRUCTION
AND
DRY DOCK
COMPANY.

(1) 12 App. Cas. 503, 509.

(2) [1912] A. C. 561, 563.

J. C. " the perils of the sea or other perils " is not a guarantee that
 1919 a ship will float, and in the same way in the present case
 GRANT, had such a policy been effected it would not have covered
 SMITH AND a loss inevitable in the circumstances due to the unfitness
 COMPANY of the structure, and entirely dissociated from any peril
 AND by wind or water. The measure of the damage for breach
 McDONNELL, of the covenant, therefore, is purely nominal, and the
 LD. cross-appeal must fail.
 SEATTLE
 CONSTRUCTION
 AND
 DRY DOCK
 COMPANY.

As, therefore, both the appellants and the respondents have failed in their independent appeals, their Lordships will humbly advise His Majesty that both should be dismissed, and that no costs should be granted in either case.

Solicitors for appellants : *Blake & Redden.*

Solicitors for respondents : *Armitage, Chapple & Co.*

[PRIVY COUNCIL.]

J. C.* 1919 Aug. 5.	ESQUIMALT AND NANAIMO RAILWAY COMPANY	}	APPELLANTS ;
	AND		
	GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED	}	RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Registration of Titles—Indefeasible Fee—Refusal to register—Pending Action going to Root of Title—Lis pendens—Land Registry Act (R. S. B. C., 1911, c. 127), ss. 14, 71.

A Registrar, who is also an Examiner of Titles, under the Land Registry Act (R. S. B. C., 1911, c. 127) is justified in refusing to register in the register of indefeasible fees under s. 14 of the Act the title of an applicant when there is registered a lis pendens in respect of an action which if it is successful will destroy the applicant's root of title. The provision for registration subject to a lis pendens is not applicable in the above-mentioned circumstances.

Judgment of the Court of Appeal reversed.

* *Present* : VISCOUNT HALDANE, LORD BUCKMASTER, LORD ATKINSON, and MR. JUSTICE DUFF.

APPEAL from an order of the Court of Appeal of British Columbia (April 1, 1919) reversing an order of Macdonald J. (June 17, 1918).

J. C.

1919

ESQUIMALT
AND
NANALMO
RAILWAY
COMPANY
v.
GRANBY
CONSOLI-
DATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

On May 22, 1918, the respondents applied in the Land Registry Office of British Columbia under the Land Registry Act (R. S. B. C., 1911, c. 127) to be registered for an indefeasible fee in certain lands in that province. The Registrar, who was also Examiner of Titles under the Act, refused the application on the ground that certain lites pendentes filed by the appellants and a lis pendens filed by one Bing Kee should first be released. On May 23, 1918, the respondents petitioned the Supreme Court under ss. 108 and 114 of the Act for an order to the Registrar-General to register their title in the register of indefeasible fees. On May 31, 1918, the appellants applied to the Court by motion under s. 110 of the Act to inhibit any dealing with or registration in connection with the lands in question, or for the issue of a caveat in respect thereof.

The facts appear from the judgment of their Lordships.

Macdonald J. dismissed the petition; the Court of Appeal reversed his decision and ordered the Registrar-General to register the respondents' title in the register of indefeasible fees.

1918. July 17, 18. *E. P. Davis K.C., Hon. M. Macnaghten K.C. and H. B. Robertson* for the appellants. The Registrar rightly refused to place the respondents upon the register of indefeasible fees. Under s. 22 a certificate of indefeasible title would be conclusive that the respondents were seised of an estate in fee simple in the land, subject to the matter mentioned in the sub-sections. Sub-s. (g) upon its true construction includes only any lis pendens registered after the date of the application. The intention was that any lis pendens registered before the application should be cleared up before the issue of a certificate. Under s. 14, a certificate is not to issue unless the Registrar (or the Examiner of Titles) is "satisfied that a good safe-holding and marketable title in fee simple has been established" (see

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
GRANBY
CONSOLI-
DATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

also s. 116a). The effect of the issue of a certificate would be to shut out the appellants from proceeding with their actions. Further, "lis pendens" as used in the Act does not include an action going to the root of the title. Under s. 71, a lis pendens may be registered as a "charge," but an action going to the root of title cannot be described as a charge, and is not within the definition of a charge in s. 2. [Reference was also made to ss. 34 and 35.]

S. S. Taylor K.C. for the respondents. The respondents were entitled to be put upon the register and to have issued to them a certificate of indefeasible title in Form C provided in the appendix. By s. 22 (g) the title under the certificate is subject to any lis pendens; the words at the end of the sub-section "registered since the date of the application" refer only to an assignment for the benefit of creditors mentioned immediately before. A lis pendens is within the definition of a charge in s. 2, and is referred to as a charge throughout the Act. The difficulties to which the respondents will be subject if their title is not registered appear from *Howard v. Miller*. (1)

Aug. 5. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from the order dated April 1, 1919, of the Court of Appeal of British Columbia, allowing an appeal from an order dated June 17, 1918, of Macdonald J. whereby he ordered that the petition of the respondent should be dismissed.

The legal proceeding out of which the appeal arises was a petition presented upon May 23, 1918, by the respondent company under ss. 108 and 114 of the Land Registry Act, R. S. B. C., 1911, c. 127, to the Supreme Court of that Province, praying that the Registrar-General, having theretofore refused to register the respondent company's title to a piece of land, about 160 acres in extent, situate in the Cranberry district of the Province, and described on the official plan of said district as s. 2, and the east 60 acres of s. 3, range 7, he might be ordered by the Court to do so.

(1) [1915] A. C. 318, 325, 326.

These lands may be conveniently referred to in this judgment as the lands in suit.

On the other side the appellant company, under the provisions of s. 110 of the aforesaid Act, applied by summons to the said Supreme Court for an order inhibiting any dealing with, or registration in connection with, the above-mentioned lands, or for the issue of a caveat in respect of them.

The petition and the motion came on for hearing together before Macdonald J., who, thinking that the District Registrar had acted properly in the course which he took, dismissed the petition, thereby rendering it unnecessary for him to make any order on the appellant company's motion for an inhibition. The reasons given by the District Registrar (who was also an Examiner of Titles under the aforesaid statute) for so refusing to register the respondent company's interest in the lands in suit as an indefeasible fee, as was demanded, were stated by him in writing to be that three lites pendentes which had been registered against the lands must first be released. Of these three two had been registered by the appellant company under the circumstances hereafter mentioned.

The respondent company appealed from the order of Macdonald J., and the Court of Appeal, by order dated April 1, 1919, allowed the appeal.

The crucial and relevant part of this order runs as follows :—

“ This Court doth order that the appeal of the Granby Consolidated Mining, Smelting and Power Company, Limited, be and the same is hereby allowed. And this Court doth further order that the Registrar-General of Titles do register the title of the appellant, the Granby Consolidated Mining, Smelting and Power Company, Limited, to the lands mentioned in the petition of the said appellant, dated May 23, 1918, in the register of indefeasible fees, in accordance with the provisions of the Land Registry Act. And this Court doth further order that the application of the Esquimalt and Nanaimo Railway Company for an order prohibiting any dealing with or registration in connection with the above-mentioned lands be dismissed and that the costs of and

J. C.

1919

ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.

GRANBY
CONSOLI-
DATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
GRANBY
CONSOLI-
DATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

incidental to such application be paid by the Esquimalt and Nanaimo Railway Company to the appellant, the Granby Consolidated Mining, Smelting and Power Company, Limited, forthwith after taxation thereof."

To enable one to judge of the legality and propriety of the Registrar's action, it is essential to consider what was the precise nature of each *lis pendens* which the appellant company had filed, and in order to do that it is necessary to trace shortly the respondent company's title from its root downwards.

The Government of the Dominion of Canada, in exercise of the powers conferred upon it by the 48 Vict. c. 6, made on April 21, 1887, a Crown grant to the appellant company of a large tract of land which came to be known as the Esquimalt Railway Land Belt. The lands in suit lie within this belt and form part of it. On December 24, 1890, the appellant company granted to one Joseph Ganner, since deceased, the surface rights, as they are styled, in these latter lands, the lands in suit. That is to say, they granted the land in fee, excepting and reserving to themselves the mines and minerals thereunder. Joseph Ganner died upon January 26, 1904, having by his last will appointed Angus Mackenzie and Charles Wilson his executors and trustees of his estate. By divers *mesne* assignments, which it is unnecessary to particularize, these so-called surface rights became, on October 6, 1917, vested in the respondent company. The Vancouver Island Settlers' Rights Act, 1904, came into operation on February 10, 1904. By s. 2 (*b*) it defined a settler as "a person who, prior to the passing of the Act, occupied or improved lands situated within the Railway Land Belt, with the bona fide intention of living thereon." It is not disputed that Joseph Ganner, deceased, came within this definition.

By s. 3 of this statute it is enacted that upon application being made to the Lieutenant-Governor in Council within twelve months from the passing of the Act (i.e., within the twelve months terminating on February 10, 1905), showing that if any settler occupied or improved any parcel of land within the said Railway Land Belt prior to the enactment

of 47 Vict. c. 14, with the bona fide intention of living on the same, accompanied with reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple of such land should be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when the said lands were first so occupied or improved by the said settler.

It was not suggested that had Joseph Ganner lived till after February 10, 1904, he would not have been entitled to have had a Crown grant made to him of the lands in suit if he had applied for it. Though the word "representative" is used in the singular, their Lordships are of opinion, that for the purposes of this section, the two executors and trustees of Ganner's estate together constitute his representative.

The operation and effect of a Crown grant of the fee simple of any land within the Railway Land Belt under this section is apparently to supersede and defeat all existing interests in the same, no matter in whom vested.

The executors of Ganner, deceased, for over thirteen years from the passing of the Act of 1904 never made any application for a Crown grant of the lands in suit. The Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, however, was passed upon May 19, 1917. By it the words "on or before the first day of September, 1917" were substituted in the Act of 1904 for the words "within twelve months from the coming into force of this Act," used in s. 3 of the latter Act. The trustees and executors of Ganner thereupon apparently resolved to bestir themselves. They applied for, and on February 15, 1918, obtained, a grant in fee simple from the Crown of the lands in suit. On February 18, 1918, they conveyed all their estate and interest in the land so acquired to one Harry Whitney Treat, who by a deed of equal date conveyed the same to the respondent company.

The respondent company, on May 22, 1918, applied to the Land Registry Office to be registered as the owners of an indefeasible fee in the said lands in suit, which is the application with which the District Registrar refused to comply. It is unnecessary to deal with the *lis pendens* filed by one

J. C.

1919

ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
GRANBY
CONSOLIDATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

J. C. Bing Kee. Those filed by the appellant company are the matters of importance.

1919

ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
GRANBY
CONSOLIDATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

On May 30, 1918, the said Vancouver Island Settlers Act, 1917, was disallowed by the Governor-General in Council. The operation and effect of this disallowance and consequent annulment under the provisions of ss. 56 and 90 of the British North America Act of 1867 upon the Crown grants of land in the Railway Land Belt made while it was operative is a serious question. The appellant company contend that these Crown grants all became void, inasmuch as they were not made within the time originally fixed by the Act of 1904. On February 14, 1918, the latter company, thinking that the Crown grant applied for by Ganner's executors had in fact been made, instituted an action against these executors, claiming amongst other things a declaration that the Crown grant made to them was null and void so far as it purported to grant to them the mines and minerals under the lands in suit, or that part of the surface of the said lands to which, or upon which, the present appellant company were entitled to exercise acts of ownership, purchase or rights of easement, and also claiming an injunction to restrain the said executors from working the mines, and from registering or applying to register any title to the said mines and minerals under the Crown grant, or from exercising any ownership in respect thereof, or from registering or applying to register any title to the surface of the said lands adverse of the appellant company's rights therein. On the same day the appellant company filed this action as a *lis pendens*. Finding that they were premature in their proceedings, they on February 18, 1918, three days after the issue of the Crown grant to the said executors, instituted a second action against the said executors in precisely the same form and claiming the same relief as the first, and on the same day filed a second *lis pendens* in respect of it in the proper Land Registry Office.

The point the appellant company thus raise may be good or may be bad. Their Lordships express no opinion as to its soundness. The Chief Justice apparently thought it bad. But he is the only judge who expressed that opinion. If

it be good, then the Crown grant made to the executors of Joseph Ganner being null and void, the respondent company took nothing by their conveyance from these executors, and have not now, and never had, by virtue of the same, any estate or interest in, or any right or title to, or any claim upon the lands in suit. They could not, therefore, be properly registered as the owners under this grant of an indefeasible fee in these lands. The point goes to the very root of their title. The suit in which it is raised and insisted upon is not brought to fix any charge, liability, or encumbrance upon this indefeasible fee, or to establish a right to any estate or interest in it. It is, on the contrary, brought to establish that never at any time was such an estate owned by, or was vested in, the respondent company.

It appears to their Lordships to be contrary to common sense to hold that an interest in land, which may, as the result of a pending lawsuit, be found to-morrow to be non-existent, should be treated to-day, by one who knew of the existence of this suit, as an indefeasible fee, since that term means an estate in fee simple held under a good safe holding and marketable title. A *lis pendens* may be described by any name the Legislature chooses to bestow upon it, whether appropriate or inappropriate. But the giving of the name does not stay the action which constitutes the *lis*. That, however miscalled, may go on to its appointed end.

It appears to their Lordships that while the title of the respondent company was being actively assailed by this pending suit, the Registrar, who in this case is also the Examiner of Titles, and therefore a judicial officer, would be acting entirely within his powers in refusing, as he has refused, to register the respondent company's title as an indefeasible fee. Sect. 14 of the Land Registry Act prescribes how he is to act when a person claiming to be registered as owner in fee simple of land applies to him in form A in the first schedule to the Act, for registration, depositing with him at the same time all the applicant's title deeds. He, the Registrar, is then, upon being satisfied that a good safe holding and marketable title in fee simple has been established by the applicant,

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
GRANBY
CONSOLI-
DATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

J. C.
 1919
 —
 ESQUIMALT
 AND
 NANAIMO
 RAILWAY
 COMPANY
 v.
 GRANBY
 CONSOLI-
 DATED
 MINING,
 SMELTING
 AND POWER
 COMPANY,
 LD.
 —

to register the title of such applicant in a book called the Register of indefeasible fees. He is not to register a title as an indefeasible fee for the asking. It is provided by s. 114 of the Act that if a person be dissatisfied with any refusal, etc., of the Registrar or Examiner of Titles, he may, as was done in this case, apply by petition to a judge in chambers, setting forth the particulars and grounds of dissatisfaction, and this judge may then make such order in the premises as the circumstances of the case may require and as he may direct. Under s. 115, whenever upon the examination of the title to any land, the Registrar, or Examiner of Titles, after hearing all the evidence procurable, entertains a doubt, he may state a case for the opinion of a Court or Judge. Sect. 116 provides for the reference by the Registrar or Examiner to a Judge in chambers for his decision or in some cases for his direction, of any one of a number of different matters. Among others the following: the true construction, legal validity or effect of any instrument or as to the persons entitled. And then by s. 116 (A), "except as in s. 50" (which does not apply) "provided, the Registrar shall not issue a certificate of indefeasible title under, or in pursuance of, any order of the Court or Judge unless such order declares that it has been proved to the satisfaction of the Court or Judge upon investigation that the title of the person to whom the certificate is directed to issue is a good safe and marketable title-holding." The order of the Court of Appeal does not contain any such declaration. That order merely directs the Registrar-General to register in the register of indefeasible fees the title of the present respondent company to the lands mentioned in their petition. It is, however, suggested that this is a mere slip in the order, and may be rectified.

The Chief Justice, as has been already pointed out, expressed the opinion that the point raised by the appellant company, arising from the disallowance of the Act of 1917, was a bad point. The Court of Appeal did not base their judgment on that, they base it on the fact that a *lis pendens*, which must mean any *lis pendens* whatever its nature, is, by s. 71 of the Land Registry Act, when registered against land,

a charge upon that land. The words of the section are :
 “ Any person who shall have commenced an action, or, being a party thereto, is making a claim in respect of any land, may register a *lis pendens* against the same as a charge, and there shall be embodied in the certificate of the Registrar of the Court a copy of the indorsement upon the writ or a copy of the plaint.” No doubt “ charge ” is defined (by s. 2) to mean and include “ any less estate than an absolute fee, or any equitable interest whatever in real estate, and shall include any incumbrance, Crown debt, judgment, mortgage, or claim to or upon any real estate.” Now it is clear that in the present case the action instituted by the appellant company has not been brought to establish that the plaintiffs in it are entitled to some estate less than a fee simple in the fee simple estate which the respondent desires to have registered. Neither is it brought to establish that they are entitled to an equitable interest in that fee simple, nor that it is subject to any incumbrance, Crown debt, judgment, mortgage, or have any other claim upon it. It is brought to establish that the respondent company who claim to be the owners of the lands in suit, are not now and never were the owners of the fee simple in these lands. The plaintiffs claim nothing in the suit of a proprietary or pecuniary nature for themselves. The relief they ask is purely negative, namely, to prevent the illegal creation in the respondent company of an interest in the lands in suit which would supersede and destroy their own estate and interest in the same.

It would appear to their Lordships that the action of the appellant company does not come within s. 71 at all. The action with which that section deals is one in which the plaintiff is making a claim in respect of land, and that action may be registered as a *lis pendens* against this land as a charge obviously to prevent the person having dominion over the land defeating the plaintiffs’ claim by alienating or encumbering it. Sect. 71 is the last of a fasciculus of eleven sections, touching caveats and *lis pendens*. The first ten sections deal with caveats. They refer to lands already registered, in which the caveator claims to have an interest

J. C.
 1919
 ESQUIMALT
 AND
 NANAIMO
 RAILWAY
 COMPANY
 v.
 GRANBY
 CONSOLIDATED
 MINING,
 SMELTING
 AND POWER
 COMPANY,
 LD.

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
GRANBY
CONSOLI-
DATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

under any one of the several instruments named. He is empowered by leave of the Registrar to lodge a caveat to prevent any disposition of the land being made without notice to him.

The land referred to in s. 71 may or may not be registered, but there is this similarity in the position of the caveator and of the plaintiffs dealt with in s. 71, that they are both asserting a claim to land or any interest in it. The means of protecting their interests are no doubt different.

It is also quite true that s. 22 of the Act provides that every certificate of indefeasible title issued under the Act shall be conclusive evidence, while it remains in force, against everybody, that the person named in such certificate is seised of an estate in fee simple in the lands therein described, against the whole world, subject to a number of things enumerated, and amongst others to "Any *lis pendens*, mechanic's lien, judgment, caveat, issue, charge, or assignment for the benefit of creditors registered since the date of the certificate." There may be some question whether these latter words do not apply to all that has gone before, and are not confined in their application to assignments for the benefit of creditors. If not, the Registrar would be obliged to register as indefeasible a title which a judgment already recovered would show did not exist.

The contention of the Granby Consolidated Mining, Smelting and Power Co. in this appeal is that the Registrar should register the respondent company as having a good estate in fee simple to the land in suit, subject to a pending action instituted to establish that they have not, and never had, any fee simple or estate or interest in the land at all. It is a misuse of terms to call a title threatened as the respondent company's is as either a safe-holding title or a marketable title. By the defeat or discontinuance of the appellant company's action and by that alone can the title of the respondent company to the lands in suit be made either the one or the other at least, where the would-be purchaser had notice of, or was aware of the existence of, the pending suit.

The questions the appellant company have raised in their

action are not such as the Registrar was called upon or required to decide. The Court of Appeal have not decided them. The Registrar took the course s. 14 of the Land Registry Act authorizes him to take when he is not satisfied that the title shown by the person applying for registration was a good holding and marketable title. In their Lordships' opinion he was completely justified by the facts of the case in so doing. They think that a *lis pendens* of the nature of the appellant company's action is not "a charge" within the meaning of the Land Registry Act, that the decision appealed from, based entirely, as it was, on the ground that it was "a charge," was erroneous and should be reversed, that the decision of Macdonald J. was right and should be restored, and that this appeal should be allowed, with costs here and in the Courts below.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Linklater & Co.*

Solicitors for respondents : *White & Leonard.*

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
GRANBY
CONSOLI-
DATED
MINING,
SMELTING
AND POWER
COMPANY,
LD.

Workmen's Compensation Act of British Columbia (Brit. Col. 6 Geo. 5, c. 77) to the dependents of members of the crew of that steamship, which was lost with all hands in waters outside British territory. The respondents were incorporated under a Dominion statute and had their head office at Montreal. The ship plied between ports in British Columbia and ports in the United States, and the members of the crew in question resided in British Columbia.

J. C.

1919

WORKMEN'S
COMPEN-
SATION
BOARD
v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.

The material statutory provisions, of which s. 8 (b) of the Workmen's Compensation Act was more particularly relevant, appear from the judgment of their Lordships.

The trial Judge, Clement J., held that the Workmen's Compensation Act, in so far as it applied to accidents happening outside the Province of British Columbia, was ultra vires the Provincial Legislature since it dealt with or derogated from civil rights outside the Province; he enjoined the appellant board from paying the compensation.

The Court of Appeal affirmed the decision, McPhillips J.A. dissenting.

1919. July 10, 12. *S. S. Taylor K.C.* and *J. B. N. de Farris K.C.* for the appellants. The material provisions of the Workmen's Compensation Act are intra vires the Provincial Legislature under s. 92 of the British North America Act, 1867. They come within head 2 as direct taxation within the Province for provincial purposes, equally with the imposition of poor rates or school rates. The fund is in the nature of a state insurance for the benefit of workmen resident in the Province. Sect. 48 treats the fund as forming part of the revenue of the Province. The provisions are also in relation to property and civil rights within the Province within head 13. They give a right against a fund within the Province, and prescribe the conditions upon which workmen therein resident are to be employed. It is not material that the accident which gave rise to the claim happened outside the Province. [Reference was made to *Hodge v. The Queen* (1) and *Attorney-General of Manitoba v. Manitoba Licence Holders' Association*. (2)]

(1) (1883) 9 App. Cas. 117, 132.

(2) [1902] A. C. 73.

J. C.
1919
WORKMEN'S
COMPEN-
SATION
BOARD
v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.

Royal Bank of Canada v. The King (1), upon which reliance was placed in the judgments, is not in point; there the Act was in derogation of a specific civil right against a fund outside the Province. The question of the validity of the provisions must be considered solely in reference to the facts of the case: *John Deere Plow Co. v. Wharton*. (2) The Act in no way conflicts with any right which the respondents had to limit their liability under s. 503 of the (Imperial) Merchant Shipping Act, 1894. That section deals with an entirely different subject—namely, damages.

E. P. Davis K.C. and *Tilley K.C.* for the respondents. The Workmen's Compensation Act, in so far as it applies to accidents happening outside the Province of British Columbia, affects civil rights outside the Province; it is to that extent ultra vires the provincial Legislature. The Act takes away the immunity which the employer has if the accident happens in a place where no local law of compensation exists. Sect. 8 (b) applies to a workman who is resident within the Province when the accident happens, but who when engaged was not so resident; consequently the immunity which the employer acquires by a contract with the workman outside the Province is taken away by s. 12 which prohibits contracting-out. Legislation which necessarily affects civil rights outside the Province is ultra vires a Provincial Legislature: *Royal Bank of Canada v. The King*. (1) The right given to the workman is in substance a right against the employer. The Act is not one in relation to taxation for the raising of money for provincial purposes. The matter dealt with is not general so as to be taxation, but affects only certain classes of employers and their workmen; the workman has no claim against the Government, only against the fund. The "dependents," under s. 2, may all be persons not resident in the Province; a payment to them in that case cannot be a Provincial purpose. [Reference was also made to *Bank of Toronto v. Lambe* (3), *Canadian Pacific Ry. v. Corporation of the Parish of Notre Dame de Bonsecours* (4),

(1) [1913] A. C. 283.

(2) [1915] A. C. 330, 338.

(3) (1887) 12 App. Cas. 575.

(4) [1899] A. C. 367.

Canadian Pacific Ry. Co v. Parent. (1)] Further, the material provisions of the Act are inconsistent with s. 503 of the Merchant Shipping Act, 1894 (Imp.), and cannot be worked in harmony with that section. They are consequently ultra vires. The British Workmen's Compensation Act, 1906, by s. 7, sub-s. 1 (f), expressly provides that that enactment is notwithstanding s. 503, thus showing that there is a conflict. The word "damages" in s. 503 is used in a broad sense, and covers compensation payable as a result of an accident. The decision of the Supreme Court of the United States in *Southern Pacific Ry. Co. v. Jensen* (2) is directly applicable. There is also a conflict with s. 215 of the Canada Shipping Act (R. S. Can., 1906, c. 113).

S. S. Taylor K.C. in reply referred, as to s. 503, to *The Ettrick* (3), *The Hector* (4), and *The Warkworth.* (5)

Aug. 5. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Court of Appeal of British Columbia dismissing, McPhillips J.A. dissenting, an appeal from the judgment of Clement J. in an action. That judgment declared that the enactment of the Workmen's Compensation Act of the Province, in so far as it purported to warrant the payment of compensation by the defendants, who are the appellants here, to the dependents of certain members of the crew of the steamship *Princess Sophia*, which foundered with all hands in waters outside British territory on a return journey from Skagway in Alaska to Vancouver, was ultra vires of the Legislature of the Province. By the judgment an injunction was also granted. The respondents are a railway company incorporated by Dominion statute. Their line runs through several Provinces, including British Columbia, and they own and operate steam vessels sailing between ports in that Province and ports in the territory of the United States. The appellant Board, of which the other appellants are the members, is a

J. C.

1919

WORKMEN'S
COMPEN-
SATION
BOARD
v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.

(1) [1917] A. C. 195, 206.

(3) (1881) 6 P. D. 127.

(2) (1916) 244 U. S. 205, 217, 255.

(4) (1883) 8 P. D. 218.

(5) (1884) 9 P. D. 145.

J. C. 1919
WORKMEN'S
COMPEN-
SATION
BOARD
v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.

body corporate constituted by the Workmen's Compensation Act referred to, for the purpose of administering the Act. The members of the crew who were lost, and to whose dependents the appellant board claims the right to pay compensation, were engaged within the Province to do work and perform services which in part had to be done and performed within the Province.

It will be convenient in the first place to turn to the provisions of the Act in question. It was passed in 1916, and its primary purpose is to confer on workmen, out of an accident fund which it established, compensation for personal injury by accident arising out of and in course of their employment. The right of the workman does not, so far as Part I. of the Act, with which alone their Lordships are concerned in this case, applies, depend on negligence on the part of the employer, as in ordinary employers' liability legislation, but arises from an insurance by the Board against fortuitous injury. The insurance money is not, as in the case of the British Workmen's Compensation Act of 1906, to be paid by the employer directly, but is provided by the Board from a fund which it collects from certain groups of employers generally. Part II. of the Act is separate, and deals with employers' liability of the ordinary type, as a different subject.

The Act defines dependents as meaning such members of the family of a workman as were dependent on his earnings at the time of his death or incapacitation, and no person is to be excluded as a dependent because he is a non-resident alien. Employer is defined to mean any person having in his service under a contract of hiring or apprenticeship any person engaged in any work in or about an industry. Part I. is applied by s. 4 to employers and workmen (other than persons casually employed) in a large number of enumerated industries, including railways and shipping. Sect. 6 enacts that the compensation is to be paid by the board out of the accident fund.

Sect. 8 is important for the present purpose. It provides (sub-s. 1) that where an accident happens while the workman is employed elsewhere than in the Province which would give a title to compensation if it had happened in the Province, he

or his dependents are to be so entitled—(a) if the place of business of the employer is situate in the Province and the residence and the usual place of employment are within it, and the employment out of the Province has immediately followed the employment by the same employer within it and has lasted less than six months; or (b) if the accident happens on a steamship, ship, or vessel, or on a railway, and the workman is a resident of the Province, and the nature of the employment is such that in the course of the work or service which the workman performs it is required to be performed both within and without the Province. (2.) Except as provided by sub-s. 1 no compensation is to be payable under Part I. of the Act where the accident happens elsewhere than in the Province. (3.) In any case where compensation is payable in respect of an accident happening elsewhere than in the Province, if the employer has not fully contributed to the accident fund in respect of all the wages of workmen in his employ who are engaged in the employment or work in which the accident happens, the employer shall pay to the board the full amount of capitalised value, as determined by the board, of the compensation payable in respect of the accident, and the payment of such amount may be enforced in the same manner as the payment of an assessment may be enforced.

By s. 9, where by the law of the country where the accident happens the workman or his dependents are entitled to compensation in respect of it, they are put to their election between claiming under that law or under Part I. of the Act. Under s. 10 the Board is subrogated to the rights of the workman or dependent against persons other than the employer if compensation is claimed under Part I., and the workman is debarred from bringing an action against an employer in case of his claiming compensation under Part I. Sect. 11 substitutes the provision made under that part for all common law or statutory rights of action against the employer in respect of accident.

Sects. 15 to 24 provide for the scale of the compensation. Sect. 25 classifies the industries to be assessed for the maintenance of the accident fund into groups, one of which includes the respondent railway company nominatim. By s. 28 each

J. C.

1919

WORKMEN'S
COMPEN-
SATION
BOARD

v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.

J. C.
1919
WORKMEN'S
COMPEN-
SATION
BOARD
v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.

employer is to furnish to the board an estimate of the probable amount of the pay-roll of each of his industries for the following year, but in computing the amount regard is to be had only to such portion of the pay-roll as represents workmen and employment within the scope of Part I.

Sect. 29 directs the Board to create and maintain the accident fund by assessing the employers in each class according to the pay-rolls. The assessments may be general, as applicable to any class or sub-class, or special, as applicable to any industry. By s. 30 every employer assessed is to retain from the wages of each workman a cent a day as a contribution towards medical aid, and to pay the amount to the board. By s. 31 the Government of the Province may contribute to the accident fund an annual sum not exceeding fifty thousand dollars. By s. 51 the Board is given power to inspect premises and to introduce regulations and safeguards for the prevention of accidents.

It is not in dispute that the persons employed by the respondent company with reference to whose dependents the present question is raised, come within the conditions under which the enactment purported to be applicable to them. Nor can it be successfully contended that the Province had not a general power to impose direct taxation in this form on the respondents if for provincial purposes. In *Bank of Toronto v. Lambe* (1) it was decided by the Judicial Committee that a Province could impose direct taxes in aid of its general revenue on a number of banks and insurance companies carrying on business within the Province, and none the less that some of them were, like the respondents, incorporated by Dominion statute. The tax in that case was not a general one, and it was imposed, not on profits nor on particular transactions, but on paid-up capital and places of business. The tax was held to be valid, notwithstanding that the burden might fall in part on persons or property outside the province.

It is, however, argued for the respondents that the Act is ultra vires in other respects. It is said that the purpose is not a provincial one, inasmuch as it is to insure the dependents

against accidents to the workmen which may happen, as in the present case, outside the limits of the Province. But in their Lordships' opinion this is not a case in which it is sought to enact any law giving a right to arise from a source outside the Province. The right conferred arises under s. 8, and is the result of a statutory condition of the contract of employment made with a workman resident in the province, for his personal benefit and for that of members of his family dependent on him. Where the services which he is engaged to perform are of such a nature that they have to be rendered both within and without the Province, he is given a right which enures for the benefit of himself and the members of his family dependent on him, not the less that the latter may happen to be non-resident aliens. This right arises, not out of tort, but out of the workman's statutory contract, and their Lordships think that it is a legitimate provincial object to secure that every workman resident within the Province who so contracts should possess it as a benefit conferred on himself as a subject of the Province. When he enters into this contract, it also appears to them to be within the power of the Province to enact that, if the employer does not fully contribute to the accident fund out of which the payment is normally to be made, the employer should make good to that fund the amount required for giving effect to the title to compensation which the workman acquired for himself and his dependents. The scheme of the Act is not one for interfering with rights outside the Province. It is in substance a scheme for securing a civil right within the Province. The case is wholly different from that from Alberta which was before the judicial committee in *Royal Bank of Canada v. The King* (1), where it was held that the Provincial statute was inoperative in so far as it sought to derogate from the rights of persons outside the Province of Alberta who had subscribed money outside it to recover that money from depositaries outside the Province with whom they had placed it for the purposes of a definite scheme to be carried out within the Province, on the ground that by the action of the Legislature of Alberta the scheme for which alone they had subscribed had been altered.

(1) [1913] A. C. 283.

J. C.

1919

WORKMEN'S
COMPEN-
SATION
BOARD
v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.

J. C.
1919
WORKMEN'S
COMPEN-
SATION
BOARD
v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.
—

The rights affected were in that case rights wholly outside the Province ; here the rights in question are the rights of workmen within British Columbia. It makes no difference that the accident insured against might happen in foreign waters. For the question is not whether there should be damages for a tort, but whether a contract of employment made with persons within the Province has given a title to a civil right within the Province to compensation. The compensation, moreover, is to be paid by the Board and not by the individual employer concerned. No doubt for some purposes the law sought to be enforced affects the liberty to carry on its business of a Dominion railway company to which various provisions of s. 91 of the British North America Act of 1867 apply. But for other purposes, with which the Legislature of British Columbia had jurisdiction to deal under s. 92, it was competent to that Legislature to pass laws regulating the civil duties of a Dominion railway company which carried on business within the Province, and in the course of that business was engaging workmen whose civil rights under their contracts of employment had been placed by the Act of 1867 within the jurisdiction of the province.

It was further contended for the respondents that s. 503 of an Imperial statute, the Merchant Shipping Act, 1894, invalidated the provision in question made by the provincial Legislature, on the ground that the Imperial statute had conferred a civil right from which the Province could not derogate. Upon this they desire to point out that whether the expression "damages" in the section applies to a liability such as that under consideration, a liability not of the shipowner, but of the Board, is more than doubtful. For the taxation complained of in the present case is imposed with the object of establishing an institution which shall provide insurance benefits for persons whose contract of employment arises within the Province, and it is not directed to the very different purpose of making the employer directly compensate his workman by way of damages for injury arising out of what has not the less to be proved as a tort because it may have happened, in the language of s. 503, without his actual fault or privity.

It was also argued that s. 215 of the Canada Shipping Act,

passed by the Dominion Parliament and forming ch. 113 in the Revised Statutes of 1906, was inconsistent with the right of the Province to legislate as it has done. That section provides that if the master or any seaman or apprentice of any Canadian foreign sea-going ship receives injury in the service of his ship, the owner is to defray inter alia the expense of providing the necessary surgical and medical advice, with attendance, medicines, and subsistence, until the person injured is cured or dies, or is brought back to a home port. The only observation which it is necessary to make about this section is that it does not purport to cover the same field as does the British Columbia statute.* It may conceivably give rise under that statute to particular questions of election. There are no materials before their Lordships upon which they can pronounce on this point, but it in no way renders ultra vires the scheme of the statute under consideration.

For these reasons their Lordships will humbly advise His Majesty that the judgment appealed from should be reversed, that the action should be dismissed, and that the appellants should have their costs of this appeal, and in both Courts below.

Solicitors for appellants : *White & Leonard.*

Solicitors for respondents : *Blake & Redden.*

J. C.
1919
WORKMEN'S
COMPEN-
SATION
BOARD
v.
CANADIAN
PACIFIC
RAILWAY
COMPANY.

[PRIVY COUNCIL.]

J. C.* CREELMAN AND ANOTHER APPELLANTS ;
 1919
 June 27. HUDSON BAY INSURANCE COMPANY . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
 COLUMBIA.

*Canada (British Columbia)—Vendor and Purchaser—Registration of Titles—
 Indefeasible Title—Vendor Company—Holding ultra vires—Land Registry
 Act (R. S. B. C., 1911, c. 127), s. 22.*

When a company has been granted in respect of land in British Columbia a certificate of indefeasible title under the Land Registry Act (R. S. B. C., 1911, c. 127), purchasers of the land from the company cannot dispute the validity of the title on the ground that the company had no power under its Act of incorporation to hold the land.

Judgment of the Court of Appeal affirmed.

APPEAL from the Court of Appeal of British Columbia (April 2, 1918) reversing the judgment of Morrison J.

The action was brought by the respondents in December, 1916, to recover moneys payable by the appellants under an agreement dated December 30, 1911, whereby the respondents sold to the appellants certain land in British Columbia. The appellants resisted the claim on the ground that the agreement was ultra vires and void, and counterclaimed for money which they had paid under it.

On February 5, 1913, the respondents had obtained a certificate of indefeasible title in respect of the land under the Land Registry Act (R. S. B. C., 1911, c. 127), s. 22, as amended by the statutes of British Columbia, 1913, c. 36, s. 8.

The trial Judge, Morrison J., held that the land was not required for the purposes, use, or occupation of the respondent company within the meaning of s. 14 of its special Act, and upon that ground he gave judgment for the appellants upon the claim and counterclaim.

The Court of Appeal unanimously reversed the decision of the trial Judge.

* *Present* : LORD BUCKMASTER, LORD PARMOOR, and LORD WRENBURY.

1919. June 27. *Joseph Martin K.C.* for the appellants. The evidence showed that this land was not required for the purposes, use, or occupation of the respondents. Their holding of it was accordingly ultra vires their Act of incorporation, and they had no title which they could transfer. Property conveyed to a common law corporation may vest although the corporation is not empowered to acquire the property. That is not so in the case of a statutory corporation, whose powers are strictly limited by its Act of incorporation: *Bonanza Creek Gold Mining Co. v. The King*. (1) The Land Registry Act, a provincial statute, could not alter the powers granted to the respondent by the Dominion statute by which it was incorporated. The certificate of indefeasible title therefore was invalid and conferred no title. The appellants are entitled to recover upon their counterclaim.

J. C.
1919
CREELMAN
v.
HUDSON
BAY
INSURANCE
COMPANY.

E. P. Davis K.C. and *Hon. M. Macnaghten K.C.* for the respondents were not called upon.

June 27. The judgment of their Lordships was delivered by LORD BUCKMASTER. On December 30, 1911, the appellants entered into an agreement to buy from the respondents certain land in Vancouver. The agreement is said to be antedated, but into this and the other circumstances which led to the agreement being made their Lordships do not think it is necessary to inquire. The terms of the agreement provided for payment of the purchase price in certain instalments, and threw upon the appellants the duty of discharging an existing mortgage upon the property. Default was made by the appellants in their obligations, and the proceedings out of which this appeal has arisen were taken by the respondents against them for the purpose of obtaining the relief to which they were entitled by the terms of their bargain. Morrison J., before whom the case was heard, dismissed the action, but his judgment was reversed by the Court of Appeal of British Columbia, who gave judgment in favour of the respondents. As to the form of that judgment no complaint is made. The complaint is against the substance, upon the ground that the respondents in fact

(1) [1916] 1 A. C. 566.

J. C.
1919
CREELMAN
v.
HUDSON
BAY
INSURANCE
COMPANY.

had no title whatever to dispose of this land, and that the contract which they sought to enforce was null and void and incapable of being made the subject of legal proceedings.

That contention depends upon these circumstances: The respondents are a company incorporated by a Dominion statute of 1910, and their powers of holding and disposing of real estate are subject to restrictions and limitations imposed by s. 14 of that statute, which is in these terms: "The new Company may acquire, hold, convey, mortgage, lease, or otherwise dispose of any real property, required in part, or wholly, for the purposes, use, or occupation of the new Company, but the annual value of such property held in any Province of Canada shall not exceed 5,000 dollars, except in the Province of British Columbia, where it shall not exceed 10,000 dollars." It is not suggested that the property acquired by the company in this case exceeded in annual value the sum of 10,000 dollars. It is said that it was not in fact acquired wholly or in part for the purposes of the use or occupation of the company, and that, therefore, they had no power to hold or to dispose of it.

Their Lordships do not propose to consider whether or no the circumstances in which this property was acquired were circumstances which would justify this contention, but upon the assumption that the property was not so acquired the appellants are still faced with this difficulty: There is a statute of the Province of British Columbia which regulates the registration of title of property bought and sold within its territory, and that statute provides that where registration takes place a certificate shall be issued, and that a certificate of indefeasible title issued under the statute shall so long as the same remains in force and uncanceled be conclusive evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is seized of an estate in fee simple in the land therein described against the world, subject to certain reservations and exceptions which are not material for the purposes of the present case. Such a certificate of registration was obtained by the respondent company on February 5, 1913, and the appellants, realizing that on the

words of the section they are unable to dispute the title which the certificate confers, attempt to escape from the difficulty by asserting that the circumstances render such certificate wholly void. They assert that the fact that the land was not acquired for the purposes of the company prevents the company being registered, and that as they are unable to be registered, it is impossible that the certificate can grant any title. The appellants further contend that unless this view be accepted, it would necessarily follow that by means of this registration Act it would be possible for a provincial statute to defeat and override Dominion legislation.

Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in s. 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration. Nor, in their Lordships' opinion, will the rights of the Dominion Legislature be in any way interfered with by this conclusion. It is impossible to assume that the officer in charge of the registration will not do his duty in investigating titles before he issues the certificate, and if in this case the certificate was issued inadvertently it would still have been competent for the Attorney-General of the Dominion, while the company remained upon the register, to have taken steps, had he thought fit, to have had the register rectified. It might also have been competent for a shareholder of the company to take similar proceedings, but upon this it is unnecessary for their Lordships to express any decided opinion. The register remains unaltered and unchallenged, and the only question for decision now is as to the effect of the certificate which the company have held from February 5, 1913, down to the present time.

In their Lordships' opinion, the appellants are bound to accept that certificate, and consequently to comply with all their obligations under the contract. Their Lordships agree

J. C.
1919
CREELMAN
v.
HUDSON
BAY
INSURANCE
COMPANY.

J. C.
1919
CREELMAN
v.
HUDSON
BAY
INSURANCE
COMPANY.

with the view expressed by McPhillips J.A. that it appears to be beyond all controversy that the appellants can have conveyed to them an absolutely indefeasible title to the land which they have contracted to purchase, and they are unable to see why the learned judge expressed any hesitation as to the necessary consequences following from that clear and definite statement of opinion.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Gurd, Legall & Co.*
Solicitors for respondents : *Armitage, Chapple & Co.*

[PRIVY COUNCIL.]

J. C.*
1919
July 22.
HINEITI RIRERIRE ARANI APPELLANT ;
AND
PUBLIC TRUSTEE OF NEW ZEALAND . RESPONDENT.
MATILDA LINDSAY AND WHAITIKI- }
TIKI ARANI } INTERVENERS.

[CONSOLIDATED APPEAL.]

ON APPEAL FROM THE NATIVE APPELLATE COURT OF NEW ZEALAND.

New Zealand—Adoption—Maori Adoption of European Child—Right of Succession—Adoption of Children Act (No. 8 of 1895), s. 7—Native Land Claims Adjustment and Laws Amendment Act (No. 65 of 1901), s. 50.

Under the Adoption of Children Act (No. 8 of 1895, New Zealand) a Maori can adopt a European born child, and the child so adopted has the rights of succession which a natural born child would have had. Judgments of the Native Appellate Court affirmed.

CONSOLIDATED APPEALS by special leave from two judgments of the Native Appellate Court of New Zealand (October 8, 1908, and July 18, 1910), the first varying and the second affirming a judgment of the Native Land Court.

* *Present* : LORD BUCKMASTER, LORD ATKINSON, and LORD PHILLIMORE.

The facts of the case and the grounds of the judgments in the Courts in New Zealand appear from the judgment of their Lordships.

1919. June 23. *Hutchison K.C.* and *Northcote* for the appellant. The first intervener, Matilda Lindsay, was a European born child. There are concurrent findings that Maori custom does not admit the adoption of a European child. Moreover, the land in question was native land which by Maori custom could only be held by a person of Maori blood, and by the Native Land Act of 1894 was inalienable. The Adoption of Children Act, 1895, is in perfectly general terms and cannot be taken as overriding well-established custom: *Leicester Corporation v. Burgess*. (1) Act No. 65 of 1901, by s. 50, provides that no claim by adoption to the estate of a native shall be recognized unless the adoption is registered in accordance with regulations to be made by the Governor. The form of notice provided by regulation applies in terms only to an adoption "according to Maori custom." Thus, even if under the Act of 1895 a European child can be adopted by a Maori, the child cannot succeed to his adopted father's estate. But the true inference to draw is that the Act of 1865 did not authorize a Maori to adopt a European child. [Reference was made to Native Land Court and Native Appellate Court Decisions (published by authority of the Parliament of New Zealand, 1907), pp. 11, 16.]

Dowson for the second intervener adopted the above arguments.

R. H. Hodge for the first intervener. Under s. 7 of the Adoption of Children Act, 1895, an adopted child has all the rights of a natural born child. Maoris are not excluded from the operation of the Act. By Act No. 11 of 1865, re-enacted by Act No. 126 of 1908, every Maori is to be deemed to be a natural born subject for every purpose. The Act of 1895 does not prevent a Maori from exercising the customary mode of adoption, it gives him additional rights. The right of an European child adopted by a Maori to succeed to the adoptive

J. C.

1919

HINEITI
RIRERIRE
ARANI
v.
PUBLIC
TRUSTEE
OF
NEW
ZEALAND.

(1) (1833) 5 B. & Ad. 246.

J. C.
1919
HINEITI
RIRERIRE
ARANI
v.
PUBLIC
TRUSTEE
OF
NEW
ZEALAND.

father's estate is not taken away by the form provided under s. 50 of Act 65 of 1901, nor can any inference be drawn from that form that the Act of 1865 did not apply to Maoris. The Act of 1901 merely provides for registration; all that can be said is that no form appropriate to the case has yet been provided.

The respondent did not appear.

July 22. The judgment of their Lordships was delivered by

LORD PHILLIMORE. These are appeals brought by special leave from two decisions of the Native Appellate Court of New Zealand, the first reversing and the second affirming the decisions of the Native Land Court.

The power of His Majesty by virtue of his prerogative to hear in his Privy Council appeals from that Court was affirmed by this Board in the case of *In re Wi Matua's Will*. (1)

The questions to be decided are whether a Maori married couple can adopt a European child so as to give the child the legal status of their child, and whether, further, a child so adopted can succeed as a Maori child could to inalienable native lands, the successions having accrued before the Act No. 15 of 1909 which removed many of the restrictions on the alienation of such lands.

Erueti Arani and Mariana Pine were two full-blooded Maoris, and were husband and wife. According to Maori custom a man may have more than one wife, but in this case there was no other wife. The couple were minded to adopt children, and in about the year 1896 adopted a Maori girl, Hineiti Rirerire Arani, who is the present appellant, and in the following year a European child, Matilda Lindsay, to whom was given the name of Hurihuri Mathilda Arani, who is the principal intervener and respondent in the present appeal. Later on they adopted another Maori child, a boy, who is the other intervener in the present appeal; and still later the husband took some abortive steps to adopt a fourth child, again an European.

Maori custom recognizes the practice of adoption which

(1) [1908] A. C. 448.

apparently gives the adopted child all the rights of a natural born child; but it is contended that this custom does not admit of the adoption of children who have not Maori blood in their veins.

It does not appear in the case whether there are any special ceremonies or requisites to prove a Maori adoption, but it is stated that the adoption of a child, according to Maori custom, has always been an event of notoriety and made with the expressed or tacit approval of the tribe. There is no doubt that sufficient was done in the case of the Maori children to comply with Maori custom, and it is not denied that if Matilda Lindsay were eligible for adoption sufficient was done in her case to make the adoption good according to Maori custom also.

By the Adoption of Children Act, 1895, upon the application in writing in the prescribed form to a judge by husband and wife jointly an order of adoption may be made by the judge in favour of the applicants. "Child" is defined as any boy or girl under the age of 15 years. By s. 7 of the Act: "When an order of adoption has been made, the adopted child shall for all purposes, civil and criminal, and as regards all legal and equitable liabilities, rights, benefits, privileges and consequences of the natural relation of parent and child, be deemed in law to be the child born in lawful wedlock of the adopting parent." There are certain restricting provisos which are not material in the present case.

On January 11, 1900, the husband and wife applied for and obtained an order of adoption under this Act in favour of the respondent, Matilda Lindsay.

After the passing of the Native Land Claims Adjustment and Laws Amendment Act, 1901, and in order to comply if possible with its provisions, the husband and wife, on October 23, 1903, applied for registration of their adoptions in accordance with s. 50, and on November 19, 1903, notices of the adoption of the three children, the two Maoris and the respondent, Matilda Lindsay, were gazetted in the New Zealand Government Gazette and the Maori Gazette.

The husband died on November 21, 1907, having made a will by which after the death of his wife his property was to

J. C.
1919
HINEITI
RIRERIRE
ARANI
v.
PUBLIC
TRUSTEE
OF
NEW
ZEALAND.

J. C.
 1919
 HINETHI
 RIERIRIE
 ARANI
 v.
 PUBLIC
 TRUSTEE
 OF
 NEW
 ZEALAND.

pass to such of his four adopted children as should be living at the death of his wife. He appointed the Public Trustee executor, and the latter having obtained probate, made an application to the Native Land Court to determine who were the successors to the inalienable lands of Erueti Arani. That Court, on April 30, 1908, determined that the two Maori children and they only were entitled to succeed, to the exclusion of Matilda Lindsay and the European boy, who had not been effectively adopted. From this decision the Public Trustee appealed to the Native Appellate Court, which varied the order of the Land Court, and on October 8, 1908, admitted Matilda Lindsay to share in the succession.

Mariana Pine, the wife, died in the year 1908, and upon her death the succession to certain other inalienable lands became open. Application was again made to the Native Land Court to determine the succession, and the Court, this time following the previous decision of the Appellate Court, on November 15, 1909, admitted Matilda Lindsay to share. Thereupon the present appellant appealed to the Native Appellate Court, which on July 18, 1910, dismissed the appeal. It is from these two orders of the Native Appellate Court that the present appeal has been brought.

The reason for the first decision of the Native Land Court was expressed in the following words: "The Native Land Court Acts only provide for the mode of registration of a Maori adoption, and before such a registration can be effected an actual adoption according to Maori custom must be in esse. According to the ancient law of Maori custom it is obvious that there were no European children to adopt, and ergo there could be no custom of adopting European children. Within the last few years there have been many attempts to adopt European children, but the Court has not countenanced this. A Maori cannot adopt and register under the Native Land Court Acts any child unless such child has Maori blood in its veins."

On the other hand the judgment of the Appellate Court was as follows: "We are of opinion that, as the case was presented to the Native Land Court, the decision of that Court

was correct ; but it has now been proved to us that this child was on January 11, 1900, adopted under the provisions of the Adoption of Children Act, 1895, by the deceased Erueti Arani and his wife Mariana Arani. Presumably, in order to avoid any question being raised as to the effect of s. 50 of the Native Land Claims Adjustment and Laws Amendment Act, 1901, the adoption was in 1903 registered in terms of that section. We do not see anything in the Adoption of Children Act, 1895, excluding Maoris from its operation. . . . The Order of adoption under that Act gives the adopted child the legal status of the child born in lawful wedlock of the adopting parent. Having acquired such status, it follows that according to Maori custom the child is entitled to succeed to its adopting parent's estate in common with his other children, if any."

It was pointed out by counsel for the appellant that the Native Land Court had found that the Maori custom of adoption did not admit of the adoption of European children, and that the Appellate Court had accepted this view, and that consequently their Lordships had to treat this as a settled matter. This may be so, and therefore it may be that Matilda Lindsay was not and could not have been adopted according to Maori custom, but she may well have been adopted according to the general law of New Zealand.

In this connection it may be well to notice that by Act No. 11 of 1865, s. 2, "Every person of the Maori race within the colony of New Zealand . . . shall be taken and deemed to be a natural born subject of Her Majesty to all intents and purposes whatsoever." These provisions are re-enacted, by the consolidating Act of 1908, No. 126.

It would, therefore, appear that a Maori has the same rights of availing himself of the Adoption of Children Act as a person of European descent. The maxim "*Generalia non derogant specialibus*" was relied upon on behalf of the appellant, but this is no case of derogation but of facultative addition. The right of the Maori to adopt according to his own custom is not interfered with by giving him a further right to adopt in the form and under the conditions provided by the Act.

J. C.
1919
HINEITI
RIREIRE
ARANI
v.
PUBLIC
TRUSTEE
OF
NEW
ZEALAND.

J. C

1919

HINEITI
RIRERIRE
ARANIv.
PUBLIC
TRUSTEE
OF
NEW
ZEALAND.

Under this Act "child" is defined as meaning any boy or girl under the age of 15 years, "adopted child" as meaning any child concerning whom an Order of adoption has been made as in the Act provided, and s. 7 already quoted gives to a child for whom an Order of adoption has been made the same privileges as if it were a natural born child of the adopting parents.

In this state of the law the Appellate Court held that, as the child had acquired the legal status of a child born in lawful wedlock, it was, according to Maori custom, entitled to succeed to the adopting parents' estate in common with any other children. This may be interpreted as meaning that the paramount Maori custom is that an adopted child has the same capacity of succession as a natural born child, and that, given that the child has been adopted, Maori custom does not look behind the fact of adoption, but gives the adopted child its full rights.

Their Lordships think that the judgment can be supported on this ground. They have been referred by counsel to an interesting series of judgments in the Native Courts reported in the form of a return to the House of Representatives in 1907 in which there are several cases about adoption and succession well worth examination. In one of these cases decided by the Native Appellate Court in 1906, called "The Blake-Wellwood Appeal," children mainly of European descent, but having some Maori blood in their veins, were held to be capable of adoption according to Maori custom, and it was admitted at the Bar that this was the true state of the law. In that case the Appellate Court said: "It is, however, abundantly clear that Native custom, and especially the Native custom of adoption, as applied to the title of lands derived through the Court, is not a fixed thing. It is based upon the old custom as it existed before the arrival of Europeans, but it has developed, and become adapted to the changed circumstances of the Maori race of to-day."

It may well be that this is a sound view of the law, and that the Maoris as a race may have some internal power of self-government enabling the tribe or tribes by common consent to

modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area which must stand as it always has stood, seeing that there is no quasi legislative internal authority which can modify it. There is another decision of the Appellate Court in an appeal regarding the succession to Heni Hekiera from which a similar principle may be deduced.

During the course of the argument at their Lordships' Bar an affidavit by a distinguished New Zealand Chief was tendered as furnishing additional evidence of Maori custom. Their Lordships were not required to decide whether it was admissible at this stage or not. They have looked into it to see whether it would furnish any guide for further inquiry, but upon careful perusal it adds nothing to the statements as to Maori custom as they are to be gathered from the several decisions in this case and those contained in the report to the House of Representatives.

The judgment of the Appellate Court in this case may also be supported as based upon the express provisions of the Adoption of Children Act. So far, therefore, as any points were raised in the first case, the judgment under appeal in that case seems to their Lordships to be right.

But upon the second appeal, when the question of succeeding to the wife's estate arose, a further point was taken against the claim of the respondent, which was based on the Native Land Claims Adjustment and Laws Amendment Act, 1901. "Sect. 50.—No claim by adoption to the estate of any native dying after March 31, 1902, shall be recognised or given effect to unless such adoption shall have been registered in the Native Land Court in accordance with regulations to be made as hereinafter provided. . . . The Governor in Council is hereby empowered to make such regulations as to the form and manner of such registration and the fees to be payable in respect thereof as he may deem necessary or expedient."

Regulations made by the Governor under this section were gazetted in December, 1901, and provided (Regulation 1) that notice of adoption in the following form should be gazetted

J. C.
1919
HINEITI
RIRERIRE
ARANI
v.
PUBLIC
TRUSTEE
OF
NEW
ZEALAND.

J. C.
1919
HINEITI
RIRERIRE
ARANI
v.
PUBLIC
TRUSTEE
OF
NEW
ZEALAND.

in the Government Gazette and the Kahiti (or Maori Gazette),
namely—

“ To the Registrar of the Native Land Court.

“ District.

“ I (We) of
hereby give notice that I (we) have taken
a child of and to be my (our) adopted
child according to Maori custom, and I (we)
request that such adoption be registered under
the provisions of s. 50 of the Native Land Claims
Adjustment and Laws Amendment Act, 1901.

“ As witness my (our) hand(s) this day of
, 19 .

“ Signed by the said
in the presence of .”

The Regulations also required (Regulation 5) the Registrar of the Native Land Court after registration of such notice to gazette the same in the Government Gazette and the Kahiti (or Maori Gazette).

The actual notice of adoption has not been produced to their Lordships, but their Lordships have been asked to infer that it followed the form provided by the regulation. It is contended that such a notice must be bad, as the form purports to state that the parents have adopted a child according to Maori custom, and this child could not be adopted according to Maori custom. The Appellate Court rejected this contention, and their Lordships think correctly rejected it. The matter may be looked at from either of two points of view. Either the section must be taken to be confined to cases of adoption according to Maori custom, and, if this be so, this child was not deprived of her right to claim against the estate of her native adopting parent by the restrictive provision of the Act; and this was probably the intention of the Legislature; or the form of notice prescribed by the regulation is too restrictive in its terms, and is not without modification applicable to such special circumstances as occur in this case. But the right of the parent and of the child to be able to comply as they are intended to be able to comply with the provisions

of the statute is not to be taken away by a defect in the form of notice provided by the regulation.

It may be that the notice which, as has been said, their Lordships have not seen, was modified so as to adapt it to the particular circumstances and was accepted as so modified. It may be that it was strictly followed, though as followed it contained a misstatement which was not of importance. Their Lordships accept the language of the Appellate Court upon this point as sound: "If registration was under the circumstances necessary at all we think there has been a sufficient compliance with the statute. A mere error in describing the adoption as being one by Maori custom instead of by an Order of Adoption then actually in force, could not, in our opinion, have the serious effect which Mr. Treadwell asks us to give to it. The fact of there having been an adoption of this child by the deceased was duly registered; there was at the time no adoption according to Maori custom and the mischief which s. 50 was manifestly aimed against was effectually guarded against by the notice given."

Upon the whole their Lordships are of the opinion that the decisions of the Native Appellate Court are right and should be affirmed, and that these appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant and second intervenant: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for first intervenant: *Biddle, Thorne, Welsford & Gait.*

J. C.

1919

HINEITI
RIREREIRE
ARANI
v.
PUBLIC
TRUSTEE
OF
NEW
ZEALAND.

and his judgment was affirmed by the Appellate Division. The appeal is reported at 43 Ont. L. R. 17.

1919. July 24. *Sir John Simon K.C.* and *Geoffrey Lawrence* for the appellants. Apart from s. 249 of the Municipal Act (a section which substantially reproduces the law previously in force) the contract being executed, the appellants could maintain an action against the corporation although the contract was not under seal: *Lawford v. Billericay Rural Council* (1), *Clarke v. Cuckfield Union*. (2) The Municipal Act does not bring the case within *Young v. Leamington Corporation*. (3) The necessity under s. 249 for a by-law arises only with regard to the exercise of the corporation's unilateral powers; it does not make the passing of a by-law a condition to suing upon a contract enforceable although not under seal. The dissenting judgment of Gwynne J. to that effect in *Waterous Engine Works Co. v. Corporation of Palmerston* (4) is correct. The council, by ordering the report to be printed, ratified the contract of employment and took the benefit of the appellant's work. The purchase of the undertakings was authorized by the Ontario statutes of 3 & 4 Geo. 5, c. 41 and c. 125; a power to obtain a report was ancillary to the powers of purchase. [Reference was also made to *Witherspoon v. Township of East Williams* (5), and the Interpretation Act (R. S. Ont., 1916, c. 1), s. 27.]

Tilley K.C. and *C. M. Colquhoun* for the respondents were not called upon.

Aug. 6. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. The Appellate Division of the Supreme Court of Ontario has in this case affirmed a judgment of Middleton J., which dismissed an action brought by the appellant to recover 42,546 dollars for services alleged to have been rendered to the respondents and for disbursements in connection with such services. The appellant's firm carry on business at Toronto as accountants and advisers

(1) [1903] 1 K. B. 772.

(3) 8 App. Cas. 517.

(2) (1852) 21 L. J. (Q. B.) 349.

(4) 21 Can. S. C. R. 556.

(5) (1919) Ont. W. N. 305.

J. C.
1919
JOHN
MACKAY
AND
COMPANY
v.
TORONTO
CITY
CORPORATION.
—

on business questions, and he claims to have been employed under a contract with the respondents, made by the mayor and duly adopted and ratified by the respondents themselves, to report on a proposed purchase of the undertakings of the Toronto Electric Light Company and the Toronto Street Railway Company.

The respondents are a municipal corporation incorporated by the Municipal Act of Ontario, being c. 192 of the revised statutes of the Province. By s. 10 of the Act the powers of a municipal corporation are to be exercised by the council. By s. 249, except where otherwise provided, the jurisdiction of every council is to be confined to the municipality which it represents, and its powers are to be exercised by by-law. By s. 258 every by-law is to be under the seal of the corporation, and is to be signed by the head of the council, or by the presiding officer at the meeting at which the by-law is passed, and by the clerk.

Early in 1913 the then mayor of the city, Mr. Hocken, thinking it desirable that the city should acquire the undertakings of the Toronto Electric Light Company and the Toronto Street Railway Company, took steps, but without preliminary authority from the council, to obtain advice and information as to the terms on which these undertakings could probably be acquired. In Toronto there is a Board of Control, established as provided by s. 209 of the Municipal Act, to which the affairs of the corporation are referred, but it cannot pass by-laws and can spend money only under the authority of the council. Mr. Hocken, having in the month of April stated to the Board of Control that he had reason to believe that the city might acquire the two undertakings on favourable terms, the council on June 18, 1913, upon the recommendation of the board, resolved that 10,000 dollars be appropriated to meet the cost of obtaining reports on the suggested transaction from three experts, named respectively Arnold, Moyes and Ross. No discussion took place at this time about the employment of the appellant. But on July 22 the mayor saw the appellant and intimated that he would like him to examine the books of the Electric Light Company and estimate the

financial results if the city took over the company's business and operated it. He asked the appellant for an estimate of the cost of his work and the time it would take. The appellant, according to his own evidence, replied in conversation that he seldom gave estimates of the cost of such work, and that his charge usually depended on three elements, time taken in the inquiry, expense involved, and his responsibility and the result of the inquiry. He went on to say that, while grateful for the mayor's confidence, he was not an applicant for the patronage of the city, and that in a matter of such magnitude and importance, if the city had not sufficient confidence to entrust the inquiry to him without stipulating in advance what the fee should be, he did not want and would not accept the retainer. According to his account of the conversation the mayor replied that he saw the reasonableness of this, but that he had the Board of Control to deal with, and that if the city acquired the properties there would be no disposition to look closely at the bill, but that if the transaction did not go through the bill would probably be thoroughly examined. The appellant's allegation is that he had stated the principles on which he fixed his charges, and that if the mayor thought that was sufficient with which to go to the Board of Control, it was all right, but if not he did not want the retainer, and that, if the matter was intrusted to him but did not go through, he was quite willing that any honest and capable man, for example the mayor himself, should fix the amount. His account of the mayor's reply is that the latter said that he was very anxious that the appellant should undertake the inquiry, and that his position as to terms would be satisfactory. According to the evidence of the mayor himself, whom the trial Judge accepted as a satisfactory witness, he told the appellant that he could not possibly fix an exact figure, but that the appellant must keep his costs within what the city was paying to Ross and Arnold, and that he, the mayor, protested against the notion that the charge for the work if completed should be greater than if it were not completed. The result of this evidence is to show that the appellant and the mayor were not really *ad idem* as to the terms on which the appellant was to

J. C.
1919
JOHN
MACKAY
AND
COMPANY
v.
TORONTO
CITY
CORPORATION.

J. C.
1919
JOHN
MACKAY
AND
COMPANY
v.
TORONTO
CITY
CORPORATION.
—

be remunerated, and that when the appellant went on with the investigation as, up to a certain point, he did, he must be taken to have done so at best on the terms of being paid on the footing of establishing a claim to reasonable remuneration. But even on this footing the question remains whether he could establish any contract at all for his employment against the council.

It appears that on May 6, 1913, an Act, c. 125 of the statutes of Ontario of 3 & 4 Geo. 5, had been passed enabling the city of Toronto to acquire by purchase all the rights and interests of the Toronto Railway Company in the street railway system, as well as those of all other companies and persons operating electric or street railways lying within the city. By the Public Utilities Act of the same year (c. 41 Ont.) the city is said to have been empowered to acquire inter alia any electrical undertaking in addition. But their Lordships are of opinion that even if these statutes conferred sufficient powers on the respondents to enter upon and to carry out the transactions as to which the appellant was instructed, the powers conferred were powers akin to those which, under ss. 10, 249 and 258 of the Municipal Act already referred to, could only be exercised by the council itself, and by by-law under seal duly signed.

Their Lordships are further of opinion, on scrutiny of the minutes of the council which have been put in evidence, and of the oral testimony, that the trial Judge and the Court of Appeal were right in their finding that there was no by-law authorizing the exercise of any power to employ the appellant. It is true that the appellant set to work, and that this work resulted in his furnishing an interim report, which was afterwards printed by direction of the council; but that report was never completed, and the acquisition of the undertakings in question did not go through. Even if the appellant could be entitled to claim on a quantum meruit it does not appear that he could have claimed an amount approaching the sum which he claims in this action. On this point they see no reason to differ from what was said by the trial Judge, who put a contingent figure for his remuneration at 7500 dollars.

The question which remains is whether the appellant has

a legal claim to anything at all against the respondents. It is argued on his behalf that the contract in the present case was an executed contract, and that the principle enunciated by Wightman J. in *Clarke v. Cuckfield Union* (1) applies. What that learned judge laid down in that case in 1852 was that whenever a corporation is created for particular purposes, which involve the necessity for frequently entering into contracts for goods or works essentially necessary for carrying the purposes for which the corporation is created into execution, a demand in respect of goods or works which have actually been supplied to and accepted by the corporation and of which they have had the full benefit may be enforced by action of assumpsit, and the corporation will be liable, though the contract was by parol only and not by deed under seal.

But their Lordships are of opinion that the case before them is outside the principle of law so laid down. Putting aside the difficulty that it is far from clear that the contract here can be regarded as fully executed, it is obvious that the corporation of the city of Toronto was not created for the particular purpose of acquiring the undertakings to which reference has been made. At best it was endowed with special powers, independent of and subsequent in date to those which it originally possessed, of taking steps to acquire them. Again this corporation is not the creature of charter and as such endowed with capacity by the common law, but it is the pure creation of a statute. It may be that the effect of the Interpretation Act of Ontario (R. S. Ont., c. 1, s. 27), which gives to every corporation the power to contract, makes this power a general feature of its statutory equipment. But the section cannot affect the prohibition imposed by the Municipal Act of the exercise of its distinctive powers otherwise than by by-law under seal. Their Lordships do not desire to be understood as saying that the powers referred to in the context are to be taken as covering the whole field of the capacity of such a corporation to contract. It can hardly have been intended by the Legislature that, for example, notepaper cannot be bought for daily use except by a special by-law under seal; it may well be that the power to

J. C.
1919
JOHN
MACKAY
AND
COMPANY
v.
TORONTO
CITY
CORPORATION.
—

J. C.
1919
JOHN
MACKAY
AND
COMPANY
v.
TORONTO
CITY
CORPORATION.
—

engage a servant is not a power ejusdem generis with the powers with which the Municipal Act is dealing when it imposes restrictions on their exercise. The language of s. 398, which enables by-laws to be made for providing for such minor appointments and for the carrying into effect of the council's own by-laws, appears to indicate that the power to make such appointments is distinguished from the special powers as to which the statute imposes restrictive formalities. But it is enough to point out that the new powers to acquire the undertaking of the Toronto Railway Company and the Electric Light Company, specially added by the two statutes of 1913 already referred to, assuming that they were sufficiently conferred, as an addition to those already in existence, belonged to the latter class. If so the judgments in the House of Lords in *Young v. Leamington Corporation* (1) show that the principle of *Clarke v. Cuckfield Union* (2) has no application, inasmuch as there is an express statutory enactment prescribing conditions for the exercise of all powers of this nature.

The decision of the Supreme Court of Canada in *Waterous Engine Works Co. v. Corporation of Palmerston* (3) was cited at the bar, and their Lordships were invited to prefer the dissenting judgment of Gwynne J. to those of the other learned judges who took part in that decision. There a municipal corporation was given express power under the then Ontario Municipal Act to purchase fire apparatus. The Act provided that all the powers of the council should be exercised by by-law unless (which was not done by the Act) the exercise of a special power was otherwise expressly authorized or provided for. The defendant corporation contracted with the appellants for the purchase of a fire engine and 550 feet of hose. No by-law was passed sanctioning the purchase. It was held by a majority in the Supreme Court, consisting of Strong, Taschereau and Patterson JJ., that this contract was not enforceable in the absence of a by-law. As the power to purchase fire apparatus was one of the powers expressly

(1) 8 App. Cas. 517.

(2) 21 L. J. (Q. B.) 349.

(3) 21 Can. S. C. R. 556.

conferred by the Act, this appears to have been right. Gwynne J. dissented. He thought that it was firmly established that in the case of an executed contract which he held that before him to be, inasmuch as the fire engine had been delivered, it was established that the common law rule that corporations can only contract under seal, did not apply. He agreed that if a by-law was a statutory requirement the possibility of contracting informally would be excluded. But he considered that the provision requiring a by-law contained in the then Municipal Act applied only to the governing or legislative powers conferred by it, and not to the ordinary executive capacity to enter into contracts, which was an ordinary common law incident of a corporation.

Their Lordships see no reason to differ from the view taken by the majority of the learned judges who decided the case, or to restrict the class of powers to which the statutory condition requiring a by-law applied to the class of legislative powers referred to by Gwynne J. Nor do they find any reason to so restrict that class in the present case which is governed by the existing Municipal Act the terms of which have already been quoted.

For the reasons given they agree with the judgments in the Courts below, and will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Solicitors for appellants : *Blake & Redden.*

Solicitors for respondents : *Freshfield & Leese.*

J. C.
1919
JOHN
MACKAY
AND
COMPANY
v.
TORONTO
CITY
CORPORATION.

[PRIVY COUNCIL.]

J. C.*
1919
August 6.

CORPORATION OF THE CITY OF
ARMSTRONG

AND

CANADIAN NORTHERN PACIFIC
RAILWAY COMPANY

RESPONDENTS.

APPELLANTS ;

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Railway—Exemption from Taxation—Lands forming Part of Railway—Approval of Plans—Failure to construct Railway.

By an Act of the Legislature of British Columbia the respondent company was authorized to construct a railway, and it was provided that the company and “properties and assets which form part of, or are used in connection with the operation of, its railway,” should be exempt from taxation. The respondent company had obtained the sanction of the Minister of Railways for the Province, under the Railway Act (R. S. B. C., 1911, c. 194), ss. 17, 18, 27, to plans for the railway running over land which they had bought in the appellant municipality, but had done no work in constructing the railway:—
Held, that the respondent company was not exempt from taxation in respect of any part of the land.
Canadian Northern Pacific Ry. Co. v. New Westminster Corporation [1917] A. C. 602 explained and applied.

APPEAL from a judgment of the Court of Appeal of British Columbia (November 5, 1918) affirming the judgment of Macdonald J. at the trial.

The respondent company in 1916 sued the appellant city corporation for a declaration that certain lands in the municipality purchased by them for the purpose of a railway which they were authorized to construct were exempt from taxation, and for an injunction.

The facts, including the terms of the statutory agreement under which the exemption was claimed, appear from the judgment of their Lordships.

The trial Judge, Macdonald J., held that the respondents were entitled to exemption in respect of the land shown

* *Present*: VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, and MR. JUSTICE DUFF.

“as constituting the plaintiffs’ right of way through the defendant municipality on plans sanctioned by the Minister of Railways for the Province,” but as to land not so shown dismissed the action.

J. C.

1919

ARMSTRONG
CITY
CORPORATION
v.
CANADIAN
NORTHERN
PACIFIC
RAILWAY
COMPANY.

The Court of Appeal, by judgments delivered by Martin and McPhillips JJ., and concurred in by Macdonald C.J. and Everts J., dismissed an appeal and a cross-appeal. The reasons for the judgment in the present appellants’ appeal were given in an appeal raising the same questions in *Canadian Northern Pacific Ry. Co. v. City of Vernon*, and were based upon the judgment of the Judicial Committee in *Canadian Northern Pacific Ry. Co. v. New Westminster Corporation*. (1)

1919. July 22. *Joseph Martin K.C.* and *J. W. Anderson K.C.* for the appellants. The respondents had done no constructional work upon the authorized branch, and were not entitled to exemption. In *Canadian Northern Pacific Ry. Co. v. New Westminster Corporation* (1) the Board held that the company, not having obtained sanction under the Railway Act to its plans was not entitled to exemption under the statutory agreement now in question. It was not held that sanction of itself would constitute the land over which the line was to run part of the railway. On the contrary the judgment shows that there must be a railway as a physical thing in existence. The words of the agreement are “forms part of,” not “intended to form part of,” “its railway.” [*Canadian Northern Ry. Co. v. City of Kelowna* (2) was also referred to. (3)]

E. P. Davis K.C. and *Hon. M. Macnaghten K.C.* for the respondents. The respondents having obtained sanction to their detailed plans are entitled to exemption, unless their delay amounts to an abandonment of their intention to construct, but that is not suggested. The Board in the previous case did not decide that actual user was necessary. The

(1) [1917] A. C. 602.

(2) (1917) 17 Brit. Col. Rep. 515.

(3) Other points were argued,

but having regard to their Lordships’ judgment they are not material to this report.

J. C. lands now in question formed "part of" the railway within
 1919 the meaning of the agreement. [*Canadian Northern Ry. Co.*
 ARMSTRONG v. *City of Kelowna* (1) was also referred to.]

CITY
 CORPORATION
 v.
 CANADIAN
 NORTHERN
 PACIFIC
 RAILWAY
 COMPANY.

August 6. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. This appeal raises a question concerning the construction and application of clause 13 (E) of an agreement dated January, 1910, between the Government of British Columbia and the Canadian Northern Ry. Co. which was ratified by a statute passed by the Legislature of the Province (10 Edw. 7, c. 4). By this clause, exemption from taxation is granted to the respondent company (a Provincial company promoted and controlled by the Canadian Northern Ry. Co.) in these terms: "The Pacific Company and its capital, stock, franchise, income, tolls and all properties and assets which form part of or are used in connection with the operation of its railway shall, until July 1, 1924, be exempt from all taxation whatsoever or however imposed by, with or under the authority of the Legislature of the Province of British Columbia or by any municipal or school organisation in the Province."

By an Act passed in 1912 (chapter 32 of the statutes of that year) the respondent company was authorized by the Provincial Legislature to construct a line of railway in a southerly direction from Kamloops; and by s. 6 of that statute the exemption stipulated for in the agreement of 1910 was, with a modification having no relevancy in the present connection, made applicable to the railway thereby authorized. By the same enactment the company was required to commence construction by August 27, 1912, and to complete its line by February 27, 1915.

It was the duty of the railway company, under the provisions of the Railway Act of British Columbia (R. S. B. C., 1911, ss. 17, 18 and 27, c. 194), before commencing construction, to deposit with the Minister of Railways a plan of the proposed line with a profile and book of reference; and these documents were deposited on October 9, 1912,

and the plan was sanctioned in the following March. The period within which construction was to be completed under the provisions of the Act of 1912 was by an Act passed in 1913 extended until August 21, 1915.

In April, 1916, the company commenced the action out of which this appeal arises claiming a declaration that certain lands in the city of Armstrong were exempt from taxation in virtue of the agreement of 1910.

At the last-mentioned date no work had been done south of Kamloops in actually constructing the railway authorized by the statute of 1912. A branch of about two and a quarter miles in length running from Kamloops Junction, a station on the company's main line, to the north bank of the South Thompson River, opposite Kamloops, was constructed in 1912 or 1913; but this although referred to in the evidence as part of the Kamloops Vernon Railway was apparently not built under the authority of the Act of 1912.

At the trial the respondents obtained a judgment declaring the "strip of land forming the plaintiff's right-of-way" as shown upon the plan deposited with the Minister of Railways to be exempt from assessment and taxation by the appellant corporation, and the appeal of the corporation to the Court of Appeal of British Columbia from this judgment was dismissed.

Before their Lordships' Board counsel for the respondent company contended that the lands described in the judgment of the trial Judge, that is to say, the lands designated in the plan sanctioned by the Minister of Railways as the company's "right-of-way," became, by virtue alone of being so designated, part of the company's "railway" within the meaning of the exemption clause of the agreement of 1910, and that in respect of them the exemption provided for took effect, and continues to have effect, until the line of railway so designated is shown to have been abandoned.

In support of this contention counsel relied upon the judgment of this Board in *Canadian Northern Pacific Ry. Co. v. New Westminster Corporation* (1), in which their Lordships

J. C.

1919

ARMSTRONG
CITY
CORPORATION
v.
CANADIAN
NORTHERN
PACIFIC
RAILWAY
COMPANY.

J. C. had to consider and apply the clause of the agreement of
 1910 which is now before them. It appeared in that case that
 ARMSTRONG the plan of the line of railway in respect of which the exemption
 CITY was claimed had not yet been approved by the Minister of
 CORPORATION was Railways ; and the railway company advanced the contention
 v. that all lands held by the company as a railway company,
 CANADIAN and intended ultimately to form part of its railway or
 NORTHERN ultimately to be used in connection with the operation of
 PACIFIC it, were included in the subjects embraced within the
 RAILWAY description " railway " as used in that clause ; and the actual
 COMPANY. ground of the judgment was that the decision of the company
 that given lands were to be part of the railway or to be used
 in connection with the operation of the railway was not in
 itself sufficient to bring such lands within the category of
 lands " which form part of or are used in connection with "
 the railway to which by the terms of the clause the exemption
 extends.

Sir Arthur Channell, who delivered the judgment of the Board, naturally emphasized the fact that the plans of the railway company had not received the sanction of the Minister, and that consequently the precise position of the railway track could not yet be known ; but the observations to be found in the judgment do not sustain the proposition to which their Lordships are now asked to give their assent. On the contrary, the observations which express the principle of the judgment, when correctly apprehended, point to a conclusion which is decisive of the present controversy in a sense adverse to the contention relied upon.

The words of the clause relating to things forming part of the railway or used in working it are, it is observed, in the present tense ; and the word " railway," it is said, is used as denoting a physical thing, something of which something else can form part and one which can be " operated." It may be added that as applied to the undertaking authorized by the Act of 1912, it means the railway or railways constructed under the authority given by that statute.

This is not to say that as regards lands alleged to form part of the railway the stipulated exemption only comes into force

in respect of lands upon which the railway is completely constructed and in operation; but on the other hand their Lordships in the judgment referred to observe that the consideration for the remission of taxation is "the benefit to the public from the railway," and that the reason for the subsidy does not arise where "the public are neither getting the actual railway, nor having it already in process of construction for their benefit."

In their Lordships' opinion, effect would not be given to these considerations by adopting the rule that the approval of the plan given by the Minister under the Railway Act is in itself sufficient to bring within the sweep of the exemption all lands designated as part of the railway upon that plan when there is nothing in the uses to which the lands are devoted or in the circumstances of their occupation to mark them in a physical sense as part of a railway constructed or in process of construction.

For these reasons their Lordships think the appeal should be allowed and the action dismissed with costs here and in the Courts below, and they will humbly advise His Majesty accordingly. (1)

Solicitors for appellants : *Mead, Steele & Co.*

Solicitors for respondents : *Linklater & Co.*

(1) Their Lordships also allowed the appeal of the Corporation of the City of Vernon against the Canadian Northern Pacific Railway Co., which was governed by the above judgment.

J. C.
1919
ARMSTRONG
CITY
CORPORATION
v.
CANADIAN
NORTHERN
PACIFIC
RAILWAY
COMPANY.

[PRIVY COUNCIL.]

J. C.*
 1919
 Oct. 21.

QUESNEL FORKS GOLD MINING COM- } APPELLANTS;
 PANY, LIMITED. }

AND

WARD AND OTHERS RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
 COLUMBIA.

Canada (British Columbia)—Mining Lease—Proviso for Avoidance—Voidable, not Void—Free Miner's Certificate—Placer-mining Act (R. S. B. C., 1911, c. 165), s. 5.

A mining lease granted by the Government of British Columbia in 1894, and validated by a special Act of the Provincial Legislature in 1895, provided as follows: "if the said lessee shall cease for the space of two years to carry on mining operations upon such premises . . . then this demise shall become absolutely forfeited and these presents and the term hereby created, and all rights, privileges and authorities hereby granted shall, ipso facto, at the expiration of the times aforesaid cease and be void as if these presents had not been made":—

Held, that upon the lessees ceasing for two years to carry on mining operations the lease was voidable at the option of the lessor, and not void.

Held, further, that as the lease did not purport to be made under the Placer-mining Act, 1911, or any corresponding Act, and the operations authorized by it were not confined to placer-mining, the lessees were not bound by that Act to have a free miner's certificate.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal of British Columbia (May 2, 1918) reversing the judgment of Macdonald J.

The appellants sued the respondents in the Supreme Court of British Columbia, claiming a declaration of the appellants' title under certain placer-mining leases held by them, recovery of possession of the lands included in the leases, damages and an injunction.

The facts sufficiently appear from the judgment of their Lordships.

The trial Judge, Macdonald J., gave judgment for the appel-

* *Present*: VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, and MR. JUSTICE DUFF.

lants, but his decision was reversed by the Court of Appeal, the Chief Justice dissenting. The appeal is reported at 25 Brit. Col. L. R. 476.

J. C.

1919

QUESNEL
FORKS
GOLD
MINING
COMPANY
v.
WARD.

1919. July 25, 28. *Joseph Martin K.C.* and *J.M. Anderson K.C.* for the appellants. The lease under which the respondents claim became invalid upon two grounds. First, by their failure after 1912 to take out a free miner's certificate, as required by ss. 5, 9 and 12 of the Placer-mining Act (R. S. B. C., 1911, c. 165). The respondents had a placer-mine within the definition in s. 2 of that Act. There is nothing in the lease to show that it was intended to relieve the respondents from the requirements of the Acts as to placer mines. This was not a Crown grant and so exempt, because it was not a grant of the fee simple: Crown Lands Act (R. S. B. C., c. 129), s. 2. Secondly, the lease became absolutely void under the terms of the proviso, upon the respondents ceasing to carry on mining operations for two years. The proviso uses the word "void" which must be given its natural meaning: *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France*. (1) If the proviso merely made the lease voidable at the option of the Crown, the option was exercised when the placer-mining leases were granted to the appellants. By the grant to the appellants the Crown bound itself to exercise the forfeiture.

Gore-Browne K.C. and *R. H. R. Reeve* for the respondents (who were called upon to argue only whether there had been a waiver of a forfeiture). The evidence shows that there was no waiver by the Crown; rent was accepted after the alleged cause of forfeiture was complete.

Oct. 21. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The question in this case is whether certain leases, granted by the Government of the Province of British Columbia to the Cariboo Hydraulic Mining Co., are valid and subsisting leases; or whether, as the appellants contend, the terms for which they were granted have come to an end.

(1) [1919] A. C. 1.

J. C.
1919
QUESNEL
FORKS
GOLD
MINING
COMPANY
v.
WARD.

It is not suggested that the terms have expired by reason of effluxion of time, but upon the grounds that first, the respondents, who are entitled to the benefit of such leases if subsisting have failed to take out a free miner's certificate as required by the Placer-mining Act (R. S. B. C., 1911, c. 165) ; and secondly, that the conditions upon which the leases were granted have not been satisfied and that they have consequently become void.

The appellants' position in the dispute is due to the fact that they are entitled to the benefit of seven placer-mining leases granted on January 13, 1916, by the Gold Commissioner for the Quesnel Mining Division of the Province of British Columbia, pursuant to the powers vested in him under the Placer-mining Act already mentioned. These leases cover the same ground as the leases under which the respondents claim, and if these latter leases are for any reason no longer subsisting, there is no question as to the appellants' title.

Before examining the provisions of the Placer-mining Act, it is desirable to consider the circumstances in which the leases for which the respondents are entitled were originally granted. Before 1894 the land in question was held under placer-mining leases issued, under a statute similar to that above referred to, to a company known as the Cariboo Hydraulic Mining Company, Limited, through which company the respondents claim. In April, 1894, that company presented a petition asking for an Act confirming them in the property already acquired by them, and in the words of the petition "consolidating the several placer-mining claims and other properties now held by them into one, with a more lasting and secure title thereto than they now have" ; and, accordingly, a statute was passed by the Legislative Assembly of the Province of British Columbia in 1894, which declared that it should be lawful for the Lieutenant-Governor in Council to demise to the company and their assigns for twenty-five years the properties which were described in the schedule, with power to work, extract, remove and retain to their own use all mines and minerals, including the precious metals therein contained, at a yearly rental of 300 dollars per annum, and also granting

the privilege of renewal at a rental to be agreed or fixed by arbitration.

It was provided that the lease to be granted under this statute should contain a covenant that the company should spend a sum not less than 500,000 dollars a year in developing, and also that they would not employ a Chinese or Japanese person in or about the property and the works connected therewith, and by ss. 3 and 4 power was also conferred to demise lands immediately adjoining those in the principal lease, not exceeding 250 acres, for a term of twenty-five years, and also so much of the waters of Six-Mile Creek and Morehead Lake, not exceeding in the aggregate 3,000 miner's inches, as defined by the Placer-mining Act, 1891, as might be necessary for any purposes connected with the undertaking.

A mining lease was granted consequent upon this statute, dated May 16, 1894, but it did not comply in exact terms with the conditions above referred to, and in particular it modified the provisions with regard to the employment of Chinese or Japanese.

Without further legislation, therefore, this lease would have been outside the powers conferred by the statute; and, in order that the position might be validated, a further Act was passed in 1895, containing extended terms with regard to the water rights and the construction of dams, and providing by s. 5 that the lease granted on May 16, 1894, "a copy of which is contained in the schedule of this Act, be, and the same is hereby declared to be, valid and binding."

This lease granted the full right to take all mines and minerals including precious metals, excepting such as were held by free miners on the date of the lease, and it contained the provisions as to avoidance of the lease in certain events, in the following terms: "Provided, always, that if the said lessee or its assigns shall cease for the space of two years to carry on mining operations upon such premises, or to do any work which shall conduce to the facility of carrying on such mining operations as aforesaid, or shall completely abandon the said premises for the space of one year, then

J. C.

1919

QUESNEL
FORKS
GOLD
MINING
COMPANY
v.
WARD.

J. C.
1919
QUESNEL
FORKS
GOLD
MINING
COMPANY
v.
WARD.

this demise shall become absolutely forfeited and these presents and the terms hereby created, and all rights, privileges and authorities hereby granted and conferred or intended so to be, shall, ipso facto, at the expiration of the times aforesaid cease and be void as if these presents had not been made."

It is the failure to comply with the conditions of this proviso that is one of the reasons why it is alleged that the lease has come to an end.

Leases were also granted pursuant to the powers in ss. 3 and 4, dated respectively March 3, 1896, and October 31, 1896, but these leases did not repeat the provisions as to cesser contained in the lease of May 16, 1894, already referred to. The respondents or their predecessors took out free mining certificates up to May 31, 1912 ; but they then ceased to renew them, and contend that, for the purpose of working the mines under the rights conferred by the lease of May 16, 1894, such renewal was unnecessary.

With regard to the failure to comply with the proviso as to working, MacDonald J., before whom the case was heard, held that there had been no complete abandonment ; but, on the other hand, he decided that mining operations of any kind ceased for a much longer period than the two years, and that there were no mining operations carried on at the time when the staking took place by the parties who obtained the leases under which the appellants now claim.

For this reason, and also because he regarded the possession of a free mining certificate as essential for the preservation of the right conferred by the leases he decided in favour of the appellants ; but his judgment was overruled by the unanimous judgment of the Court of Appeal of British Columbia and from their judgment this appeal has been brought.

The point as to forfeiture of the lease by breach of the proviso may be conveniently dealt with first. In order for the appellants to succeed upon this point, it is necessary for them to show that the failure to work rendered the lease void, without any option on the part of the lessor. According

to their contention, therefore, upon the expiration of the period during which no work had taken place, the lease must automatically have ended, and if any indulgence had been shown by the Crown it must have been in the form of a new lease and not by continuation of the old. If the covenant does not effect this, then, although the word used is "void," the meaning is "void at the option of the lessor," or in other words "voidable."

J. C.
1919
QUESNEL
FORKS
GOLD
MINING
COMPANY
v.
WARD.

Their Lordships have no hesitation in saying that that is the true meaning of the covenant. Substantial obligations are imposed upon the lessee under the terms of the lease; and it would not be consistent with the ordinary rules of construction applicable to such a document to hold that these obligations could be completely avoided by the lessee omitting to perform any work. It is of course possible so to frame a lease that this must be the effect, and it would result that the term was then a term which ended on the happening of a condition solely in the power of a lessee. This, however, is not the language used in the lease. The words are that the demise should become "absolutely forfeited" and upon this follow the provisions that the term shall ipso facto cease and be void as if these presents had not been made; but these latter words only give emphasis to the phrase as to forfeiture, and this is the forfeiture of a right held by the lessee back to the lessor.

In their Lordships' opinion this clause, though strongly expressed, is nothing but a condition of forfeiture of which the lessor is not bound to take advantage, and they think that the learned judges of the Court of Appeal were quite right in the expression of their opinion that in the circumstances of this case no act was done by the Crown to establish the forfeiture, and that, until such an act took place, the term was not ended. In addition to the authority of *Davenport v. The Queen* (1), the more recent case of *New Zealand Shipping Co. v. Société des Ateliers et Chantiers de France* (2) shows that this decision is in agreement with well-known rules of construction.

With regard to the omission to obtain a free mining certificate

(1) (1877) 3 App. Cas. 115.

(2) [1919] A. C. 1.

J. C.
1919
QUESNEL
FORKS
GOLD
MINING
COMPANY
v.
WARD.

after the very full and careful judgment of the learned judges of the Court of Appeal, their Lordships think that there is but little than can be profitably added. It will be sufficient if they indicate what appears to them to be a conclusive argument in favour of the view at which these learned judges had arrived. The Placer-mining Act refers to a special form of mining. The lease in question does not purport to be made under this or any corresponding Act ; it places no limitation on the character of the mining or on the minerals to be won, and contains no reference to the statute from beginning to end, except the reference to the computation of water-rights and the exception of rights held by free miners at the date of the grants. As pointed out by Martin J. A., there are a number of fundamental differences between this lease and the rights that would have been conferred under a placer-mining lease. Further, as again pointed out by the learned judge, the lease in question embraces four distinct classes of mining property, some of which are quite outside the statute and the leases of the adjoining lands, so that the lease cannot be related to the power conferred by the Placer-mining Act, which covers only a part of the thing demised. Indeed, the first statute recited the petition asking that all the different rights and privileges might be consolidated with a more lasting and secure title, upon such terms as may seem just ; those terms were the ones that were defined in the statute and ultimately incorporated in the lease, and were not the terms under the Placer-mining Act.

The section of the Placer-mining Act which imposes the penalty for omission to take out the certificate is in these terms: "No person or joint stock company shall be recognised as having any interest in or to any placer claim mining lease, etc. . . . or in or to any water right mining ditch, etc. . . . unless he or it shall have a free miner's certificate."

The mining lease there referred to is, in their Lordships' opinion, a mining lease under the statute and not any mining lease, however granted. They do not think that in this connection they could do better than sum up the position in the

words used by Martin J.A. : " The truth is, and the situation becomes perfectly clear when it is thoroughly studied, that this whole undertaking and the statute which authorised and assisted it must be taken, construed and given effect to as a thing complete in itself, and which it is impossible to work out in connection with any one or all of the said three mining statutes without dismembering it and defeating the whole scheme. After a most careful examination of it I do not hesitate to affirm that there is not one section in the whole Placer-mining Act of 1891 which applies to the situation created by the said special Act, and it can only properly be worked out by entirely disregarding the same."

This statement, with which their Lordships are in entire agreement, disposes of the whole question.

For these reasons they think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *Blake & Redden.*

Solicitors for respondents : *Linklater & Co.*

J. C.

1919

QUESNEL
FORKS
GOLD
MINING
COMPANY
v.
WARD.

[PRIVY COUNCIL.]

J. C.*	TRUSTEES OF THE ROMAN CATHOLIC	} APPELLANTS ;
1919	SEPARATE SCHOOLS FOR THE	
Oct. 23.	CITY OF OTTAWA	

AND

THE QUEBEC BANK AND OTHERS . RESPONDENTS ;
ATTORNEY-GENERAL FOR ONTARIO . INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

Canada (Ontario)—Legislative Power—Separate Schools—Application of Funds by invalid Commission—Validation by Statute—British North American Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-s. 1.

The appellants, the trustees for the Roman Catholic schools in Ottawa, elected under 26 Vict. c. 5 (Upper Canada), having refused to conduct the schools according to regulations validly made by the Education Department, the Legislature of Ontario, by 5 Geo. 5, c. 45, purported to authorize the appointment of Commissioners to take over the management of the schools. The Commissioners were appointed and carried on the schools from July, 1915, until November, 1916, when the statute 5 Geo. 5, c. 45, was declared by the Privy Council to be invalid. For the purposes of the schools the Commissioners drew and expended money standing to the credit of the appellants with bankers and incurred liabilities to bankers. By a statute of the Legislature of Ontario, 7 Geo. 5, c. 60, it was declared that the expenditure was to be deemed to have been made for and at the request of the appellants and that the liabilities were to be the liabilities of the appellants :—

Held, that the statute 7 Geo. 5, c. 60, was not invalid under the British North America Act s. 93, sub-s. 1, as prejudicially affecting any right or privilege with respect of the schools which the appellants had by law.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (October 24, 1918), varying the judgment of Clute J.

The appellants brought against the respondents separate actions consolidated before trial, which raised the question whether an Act of the Legislature of Ontario, 7 Geo. 5, c. 60, was, as the appellants contended, ultra vires having regard

* *Present* : VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, and MR. JUSTICE DUFF.

to s. 93, sub-s. 1, of the British North America Act (30 & 31 Vict. c. 3). (1) The terms of the Ontario statute in question and the circumstances in which it was passed appear from the judgment of their Lordships.

The Appellate Division, varying the judgment of the trial Judge (Clute J.), held that the statute was valid; the actions were accordingly dismissed and judgment was given for the respondents, the Bank of Ottawa, upon a counterclaim for a sum of 71,891 dollars advanced by that bank to the Commission. The appeal to the Appellate Division is reported at 43 Ont. L. R. 637.

1919. July 28, 29. *Sir John Simon K.C.* and *N. A. Belcourt K.C.* for the appellants. Apart from the statute 7 Geo. 5, c. 60 (Ont.), the appellants were entitled to succeed in the action. That statute was ultra vires having regard to s. 93, sub-s. 1, of the British North America Act, 1867. It was ultra vires the Legislature under that sub-section to authorize the Commission to deal with the school funds: *Ottawa Separate Schools Trustees v. Ottawa Corporation* (2); that being so, it was ultra vires to ratify the acts of the Commission. The appellants were entitled under the Separate School Act to administer the funds themselves, and to reclaim the funds from the hands of any unauthorized holder. Those rights were prejudicially affected by the Act now in question, within the meaning of s. 93, sub-s. 1.

Tilley K.C. for the respondents, and *McGregor Young K.C.* for the intervener, were not called upon to argue.

Oct. 23. The judgment of their Lordships was delivered by LORD DUNEDIN. The present case is what it is to be hoped is the last chapter of the history of the unfortunate disagreement between the Board of the Roman Catholic Schools and the educational authority of the city of Ottawa. This

(1) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-s. 1: "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union."

(2) [1917] A. C. 76.

J. C.
1919
TRUSTEES
OF THE
OTTAWA
ROMAN
CATHOLIC
SEPARATE
SCHOOLS
v.
THE
QUEBEC
BANK.

matter has already been before this Board in the two cases of *Ottawa Separate Schools Trustees v. Mackell* (1) and *Ottawa Separate Schools Trustees v. Ottawa Corporation*. (2) It is unnecessary to state on this occasion the system under which the Catholic schools are maintained, as that is set out at length in those judgments. It is sufficient to say that it was decided in the former case that a regulation of the education authority prescribing the use of English in the schools was not ultra vires as infringing the provision of s. 93, sub-s. 1, of the British North America Act, 1867; while in the latter it was held that an Act of the Legislature of Ontario appointing a Commission to take over the schools and supersede the board was ultra vires as infringing the said provision.

The Commission was in occupation of the schools theretofore managed by the appellants from July 26, 1915, till November following, when, upon the above second-mentioned judgment being pronounced, they gave up possession to the appellants. During the régime of the Commission the schools were carried on by them. In order to meet the expenses of the schools the Commission besides levying a half year's rate took a sum of 97,000 dollars odd standing at the credit of the appellants on an account in their name with the Quebec Bank. They also incurred a liability of 71,000 dollars odd to the Bank of Ottawa.

These actions were raised by the appellants against the Quebec Bank, the Bank of Ottawa and certain individual members of the Commission. There was claimed against the Quebec Bank the said sum of 97,000 dollars odd, against the Bank of Ottawa a sum of 37,000 dollars odd which had been transferred to it out of the 97,000 dollars and kept as a sinking fund to meet certain debentures issued by the Board, and against the Commissioners the sum of 84,000 dollars odd, being the produce of the half year's rate above referred to. These actions were consolidated. Pending these actions the legislature of Ontario passed the statute of 7 Geo. 5, c. 60, which is as follows:—

“Whereas pursuant to an Act respecting the Board of

(1) [1917] A. C. 62.

(2) [1917] A. C. 76.

Trustees of the Roman Catholic Separate Schools of the City of Ottawa passed in the fifth year of the reign of His Majesty, King George Fifth, chapter 45, the Minister of Education with the approval of the Lieutenant-Governor in Council on July 20, 1915, appointed a Commission consisting of Denis Murphy, now deceased, Thomas D'Arcy McGee and Arthur Charbonneau herein referred to as 'the Commissioners' to conduct and manage the Roman Catholic Separate Schools of the City of Ottawa, which said Act has been declared to be ultra vires; and whereas the Board of Trustees of the said Separate Schools prior to the appointment of the said Commission had neglected and failed to open, keep open, maintain and conduct the said schools according to law and to provide qualified teachers therefor, had threatened at various times to close the said schools and had neglected and refused to discharge and perform the duties imposed upon it by law to the loss and damage of the supporters of the said schools and to the serious prejudice of the children entitled to attend the same; and whereas by reason of the neglect and default of the Board as aforesaid it was necessary to provide special means for the education of the children entitled to attend the said schools until the Board should be willing to perform its lawful duties in respect to said schools, and the Commissioners were appointed for that purpose; and whereas the Commissioners entered into possession of the school premises and property on July 26, 1915, and thereafter maintained and conducted the said schools continuously until the said Act was declared to be ultra vires, during the whole of which time the said Board was unwilling to conduct the said schools according to law; and whereas the Commissioners in carrying on said schools and meeting obligations of the Board disbursed \$68,873.43 which at the date of their appointment stood to the credit of the Board in the Quebec Bank of Ottawa, the further sum of \$84,156.04 received out of Court pursuant to an Order of the Appellate Division of the Supreme Court of Ontario, dated April 3, 1916, and the further sum of \$71,944.08 received from other sources, all of which sums of money were by law applicable to the maintenance and conduct

J. C.
1919
TRUSTEES
OF THE
OTTAWA
ROMAN
CATHOLIC
SEPARATE
SCHOOLS
v.
THE
QUEBEC
BANK.

J. C.
1919
TRUSTEES
OF THE
OTTAWA
ROMAN
CATHOLIC
SEPARATE
SCHOOLS
v.
THE
QUEBEC
BANK.

of the said schools ; and the Commissioners in the maintenance conduct and management of the said schools, also incurred a liability to the Bank of Ottawa for \$71,891.16 and interest thereon which still remains unpaid ; and whereas the Board has commenced actions against the Quebec Bank, the Bank of Ottawa and the Commissioners to recover the moneys so disbursed as aforesaid and has refused to assume the said liability to the Bank of Ottawa and it is desirable to declare the rights of the parties ;

“ Therefore His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

“ 1. It is declared that the Commissioners disbursed the monies and incurred the liability herein recited for payments and expenditures which were necessary to maintain and carry on the said schools and which should have been made by the Board in the proper conduct and management of the said schools but for its wrongful neglect and default as aforesaid.

“ 2. It is further declared that the said payments and expenditures shall be deemed for all purposes to have been made by the Commissioners for and on behalf and at the request of the Board and that the Commissioners are entitled to indemnity from the Board in respect thereof.

“ 3. It is further declared that the said liability of \$71,891.16 and interest thereon to the Bank of Ottawa, subject to the rights of third parties, if any, is a debt of the Board to the said Bank and that the Bank is entitled to set off the same against any other monies of the Board in its hands.

“ 4. In default of payment of the said liability by the Board the same may be paid to the Bank out of the Consolidated Revenue Fund of the Province and thereafter the said sum with proper interest thereon shall be a debt to His Majesty and may be recovered from the Board in any action brought for that purpose.

“ 5. This Act may be pleaded as a defence to any action now pending or that may hereafter be brought by the Board against any person or Corporation in respect of any of the monies received and disbursed by the Commission as aforesaid.

" 6. The Order in Council made on August 26, 1915, which is set out in the Schedule herewith, is confirmed and declared to be and to have been from the said date, legal, valid and binding, and the Commissioners shall be indemnified by the Province from and against all liability for indebtedness incurred by them or damages recovered against them by reason of any of said payments and expenditures by them as aforesaid or in consequence of anything done or suffered by them or any of them while acting as such Commissioners.

J. C.
1919
TRUSTEES
OF THE
OTTAWA
ROMAN
CATHOLIC
SEPARATE
SCHOOLS
v.
THE
QUEBEC
BANK.

" SCHEDULE.

" Copy of an Order in Council approved by His Honour the Lieutenant-Governor, August 26, 1915.

" The Committee of Council have had under consideration the report of the Honourable G. H. Ferguson, Acting Minister of Education, dated 19th August, 1915, wherein he states that in view of the pending litigation in which the Roman Catholic Separate School Board for the City of Ottawa is Plaintiff and the Quebec Bank a party Defendant, the Quebec Bank has declined to pay to the Ottawa Separate School Commission the monies heretofore, now or hereafter standing to the credit of the said Board in the said Bank without a bond of indemnity from the Province in that behalf, and that there is urgent need of the monies in question for the purpose of the Commission and of the separate schools under their control and management, and it is advisable to comply with the request of the Bank. The Minister, therefore, recommends that he be authorized and empowered as Acting Minister of Education on behalf of the Province to execute and deliver with the seal of the Department of Education to the Quebec Bank a bond indemnifying and saving harmless the Bank from all loss, costs or damage the Bank may at any time suffer or sustain on account of or by reason of the payment or transfer at any time and from time to time by the said Bank to the Ottawa Separate School Commission of any monies heretofore, now or hereafter standing to the credit of the Roman Catholic Separate School Board for the City of Ottawa in the books of the said Bank or that otherwise but for the appointment

J. C.
1919
TRUSTEES
OF THE
OTTAWA
ROMAN
CATHOLIC
SEPARATE
SCHOOLS
v.
THE
QUEBEC
BANK.

of the said Commission would be the property of or payable to the said Board, or of any loans, advances, overdrafts or credits at any time or from time to time that may be made or given by the Bank to the Commission, or of anything otherwise lawfully relating to the premises, the bond to be in such penal sum and in such form and to contain such provisions as may be satisfactory to the said Bank and to the Counsel for the Department of Education.

"The Committee concur in the recommendation of the Minister and advise that the same be acted on.

"Certified,

"J. LONSDALE CAPREOL,

"Clerk, Executive Council."

The Attorney-General for Ontario was allowed to intervene as a defendant. The consolidated cases were tried by Clute J., who pronounced judgment in favour of the appellants but under deduction so far as the Commissioners were concerned of whatever sums they could show they had properly expended on the conduct of the schools while under their charge. The Appellate Court of Ontario unanimously overruled this judgment and dismissed the actions. Appeal has now been taken to this Board.

The claim against the Quebec Bank would be obviously good at common law. The bank was the debtor of the appellants, and it would be no defence to say that they had paid the money to a Commission whose authority was based on an Act of the Provincial Legislature which had been declared to be ultra vires. The real defence to the action lies in the later statute quoted above. It is equally clear that this statute by its terms provides a complete defence. The only real question is therefore whether that statute also is ultra vires. It can only so be held if it contravenes the exception to s. 93, sub-s. 1, of the British North America Act, or in other words if it prejudicially affects a right or privilege of the appellants. For indubitably in other respects it is a measure dealing with civil rights and as such within the domain of the provincial Legislature.

It was frankly admitted by the learned counsel for the appel-

lants that the money spent and the liability incurred was spent and incurred in the carrying on of the schools in a proper manner : that is to say was not in any way expended on purposes other than the carrying on of the schools. The appellants cannot say that the money if they had had it would not have been spent on the same purposes ; all that they can say is that they would have had the control and spending of it. The right which has got to be prejudicially affected is the right to maintain separate schools under the Education Acts. Now it was pointed out by the Lord Chancellor in deciding the *Ottawa Corporation Case* (1), that there might be cases where a right might be affected without being prejudicially affected. It will at once be apparent what a contrast there is between the legislation which was the subject of that decision and that in the present case. There the right of the appellants to conduct their schools was taken away for an indefinite period. Their restoration did not depend on themselves but could only be given them by others. They are now restored—that legislation having been held to be *ultra vires*—but their extrusion from management is a matter of past history which no legislation can obliterate. Nor does the present legislation seek to do so. It is possible to criticise the words used, but the gist of the statute is unmistakable. All it does is to declare that the payments made while the schools were being carried on by others than the appellants are good payments against the funds which were only raised and only available for the conduct of the said schools. If the contention of the appellants were given effect to—for they argued that the deduction allowed by Clute J. was unwarranted—the result would be that the schools would have been carried on by funds provided gratuitously by the Banks or by the individual Commissioners, the appellants would be in the possession of funds which had been destined for the carrying on of the schools in the past, and which as they could not now be so applied, would form a gratuitous bonus in their hands. Their Lordships therefore agree with the unanimous judgment of the Supreme Court that the statute is not *ultra vires* and that the actions fall to be dismissed.

(1) [1917] A. C. 76.

J. C.

1919

TRUSTEES
OF THE
OTTAWA
ROMAN
CATHOLIC
SEPARATE
SCHOOLS

v.
THE
QUEBEC
BANK.

J. C.
1919
TRUSTEES
OF THE
OTTAWA
ROMAN
CATHOLIC
SEPARATE
SCHOOLS
v.
THE
QUEBEC
BANK.

They fail to see that the right of the appellants has been in any way prejudicially affected by the statute. The only way in which they were prejudicially affected was by the action of the former statute, which extruded them from the management of the schools. Had they been left in management they would necessarily have spent this very money for the same purposes. It cannot be said to create a prejudice to affirm that the money was rightly spent for the purposes for which it was destined. The same ratio applies to a liability incurred by others for an equally proper purpose.

It may be as well to say a word as to the position of the 37,000 dollars held by the Bank of Ottawa. On the appellants paying the debt incurred to the Bank of Ottawa of 71,000 dollars odd, the said sum of 37,000 dollars will of course be made available to the appellants for the purpose for which it was set aside—namely, the provision of a sinking fund for certain debentures.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeals.

The appellants will pay the respondents' costs. The Attorney-General of Ontario will bear his own costs.

Solicitors for appellants : *Harrison, Powell & Tulk.*

Solicitors for respondents : *Lawrence Jones & Co.*

Solicitors for intervener : *Freshfields & Leese.*

[HOUSE OF LORDS.]

VAN LIEWEN	APPELLANT ;	H. L. (E)*
AND		1919
HOLLIS BROTHERS AND COMPANY,	} RESPONDENTS.	Dec. 12.
LIMITED AND OTHERS		—

Ship—Charterparty—Bill of Lading—Incorporation of Charterparty—Obligation to discharge with customary steamship Despatch but according to Custom of Port—Custom of Port of Hull—Demurrage.

A ship was chartered to load a wood cargo at a Swedish port for delivery at Hull, Victoria or Albert Dock as ordered, and by the charterparty the cargo was to be discharged with customary steamship despatch as fast as steamer can deliver but according to the custom of the port, and in the event of the detention of the ship beyond the time stipulated as above demurrage was payable at a daily rate. By the custom of the port of Hull it was the duty of the receiver of a wood cargo to arrange for the steamship (on or before her arrival in dock) a vacant available and suitable berth to which she could forthwith proceed, and also to provide a clear quay space and/or a sufficient and continuous supply of bogies. Shortly before the arrival of the ship at Hull the cargo was consigned in three parcels to three firms of timber merchants at Hull by indorsement of the bills of lading, which incorporated the conditions of the charterparty. The ship was ordered by the charterer to the Victoria Dock without any communication with the receivers or any of them. Owing to the congestion of traffic at the dock the ship had to wait several days for a vacant berth and the receivers were unable to provide either a clear quay space or a sufficient and continuous supply of bogies, which were under the control of the dock owners, and as a consequence the ship took 11 days longer to discharge than she would have done if there had been continuous despatch. Upon a claim for demurrage by the shipowner against the receivers the trial Judge found that the detention of the ship was due to causes beyond the control of the receivers:—

Held, that under a charterparty in the above form the obligation was to discharge with the utmost despatch practicable, excluding affection by circumstances not under the control of the charterer, and that the custom imposed no higher obligation on the receiver; and consequently that the claim failed.

Order of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing an order of the Divisional Court, which set aside a judgment of the county court judge of Yorkshire.

* *Present*: VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD WRENBURY, and LORD BUCKMASTER.

H. L. (E.) The appellant was the owner of the *Lizzie*, a Swedish
1919 steamship, and he claimed from the respondents eleven
 VAN days' demurrage for delay and detention of the ship
 LIEWEN upon her discharge in Hull of a cargo of timber from
 v. Sweden. The respondents were three firms of timber mer-
HOLLIS chants at Hull and were assignees of the bills of lading for
BROTHERS different parcels of the cargo, their aggregate holding
 AND representing the entire cargo. By a charterparty in the
COMPANY, "Scanfin" form dated August 14, 1915, the *Lizzie* was
 LD. chartered in Stockholm by a Swedish firm, the Bervigk and
 ----- Ala Nya Aktiebolag, to proceed to a loading place in the
 Soderhamn district of Sweden and there load a full and
 complete cargo of timber as therein described and proceed
 therewith to Hull, Victoria or Alexandra Dock, as ordered
 on arrival, or as near thereto as she might safely get, and
 deliver the same, always afloat, on being paid freight as
 therein specified.

Clause 3, so far as material, provided as follows: "The cargo to be loaded and discharged with customary steamship despatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports but according to the custom of the respective ports, Sundays, general or local holidays (unless used) in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging demurrage shall be paid at twenty-five pounds per day and *pro rata* for any part thereof. The cargo to be brought to and taken from alongside the steamer at Charterers' risk and expense as customary." By clause 6 the bills of lading were to be prepared on the form indorsed on the charter and were to be signed by the master, quality, condition and measure unknown, freight and all conditions, clauses and exceptions as per charter. By clause 10 the master was not to be obliged to sign more than one set of bills of lading unless due written notice should have been given before commencing to load. The cargo to be supplied so as to enable him to keep separate the different consignments. By clause 13 the master or owners were to have an absolute

lien upon the cargo for all freight, dead freight, demurrage and average. The charterparty also contained a strikes and epidemics clause.

The *Lizzie* was loaded at Nyhamn with a full cargo consisting of 481 standards of timber under thirteen separate bills of lading issued by the master in the form indorsed upon the charterparty to the charterers. The bills of lading contained the following provision: "All the terms and exceptions contained in which charter are herewith incorporated." Shortly before the arrival of the ship at Hull these bills of lading were assigned by indorsement as follows: Six to the respondents Hollis Brothers & Co. for 277 standards, five to the respondents Smith Brothers for 154 standards, and two to the respondents Smart and Elsom for 20 standards. The names of the consignees were communicated by the charterers to the ship's agents at Hull by telegram the day before the arrival of the ship in the Humber, and by the same telegram the charterers directed her to discharge at the Victoria Dock unless otherwise arranged by all the receivers. There was no communication by the shipowner or master or by the charterers with the respondents or any of them as to where the ship should be berthed.

The *Lizzie* arrived in the Humber on September 29, 1915, and anchored outside the Victoria Dock, but she could not be immediately admitted into the dock owing to congestion. On October 1 the dock superintendent ordered the ship into the Victoria Dock, but no berth could be assigned to her and in fact she was unable to begin to discharge her cargo until October 7 at 9 A.M., and did not complete her discharge until October 18 at 11.20 A.M. The Victoria Dock was the property of the North Eastern Railway Co., and the dock was equipped with bogie rails and bogies, which were also the property of the company. On October 2 the several respondents, being unable to obtain a clear quay space, gave orders for a supply of bogies, but owing to the congestion of the traffic the supply was insufficient for the proper and continuous discharge of the ship.

H. L. (E.)

1919

VAN
LIEWEN
v.HOLLIS
BROTHERS
AND
COMPANY,
LD.

H. L. (E.)

1919
 VAN
 LIEWEN
 v.
 HOLLIS
 BROTHERS
 AND
 COMPANY,
 LD.

Under these circumstances the appellant brought an action against the respondents in the Hull County Court for 275*l.* for 11 days' demurrage. He alleged by his statement of claim that if there had been continuous despatch the ship would have been discharged by October 7 and that by the custom and practice of the port of Hull (which was incorporated into the charterparty) an absolute duty was imposed upon the respondents to provide either a clear quay space or a continuous supply of bogies upon the arrival of the ship.

The custom relied on by the appellant was embodied in a printed statement drawn up in 1899 by a committee of representatives of shipowners and timber merchants. It was intituled "A statement of custom and practice concerning the discharge of steamships laden with wood cargoes at the port of Kingston-upon-Hull," and it contained the following clauses:—

"DISCHARGING BERTH.—It is the duty of the receiver of a wood cargo at Hull, where the dock is either named or unnamed in the charterparty, to provide or arrange for the steamship (on or before her arrival in dock) a vacant available and suitable berth to which she can forthwith proceed."

"MODE OF DISCHARGE.—It is the duty of the owner of a steamer discharging a wood cargo as above mentioned to remove the cargo from the steamer and to place it upon the quay space opposite the steamer or upon carriages on rails (termed 'bogies') or to lower the cargo into open lighters supplied and brought alongside by the receivers, and to pay for the labour necessary to perform the above work. It is the duty of the receivers of such cargo to supply and have ready a clear quay space the full length of the steamer and/or a sufficient and continuous supply of bogies and/or suitable open lighters alongside."

The respondents by their several defences, which were in identical terms, denied the alleged custom and said that if the custom existed it did not apply to a vessel with cargo for more receivers than one, but at the trial the respondents by their counsel admitted the existence of the custom as

it had been found by Bray J. in *Aktieselskabet Hekla v. Bryson, Jameson & Co.* (1) as regards a receiver of an entire cargo. H. L. (E.)

The county court judge found that the delay was due to causes beyond the control of the respondents or any of them and held, admitting the existence of the custom as set forth in the printed statement and its incorporation into the charterparty, that it had not the effect of converting a customary despatch charter into a lay day charter, and that it imposed no greater obligations upon receivers than the general law imposed upon them—i.e., to use their best endeavours to provide quay space and bogies. He therefore gave judgment for the respondents.

This decision was reversed by the Divisional Court (Horridge J. and Hill J.) upon the ground that the effect of the custom was to impose upon the respondents an absolute duty to provide quay space and bogies, and judgment was entered for the appellant against the respondents jointly for the full amount claimed.

The Court of Appeal (Swinfen Eady M.R., Duke L.J. and Eve J.) reversed the order of the Divisional Court and restored the judgment of the county court judge. The Master of the Rolls and Eve J. held that the evidence taken as a whole failed to prove any uniform custom of imposing an absolute obligation on either the charterer or the receiver of the cargo.

Duke L.J. proceeded on the ground that the evidence did not establish any absolute obligation upon the receivers of part only of a wood cargo to provide quay space or bogies.

Nov. 14, 17. *Compston K.C.* (with him *Harney*) for the appellant.

The charterparty imposes on the charterers the duty of discharging the ship according to the custom of the port subject to the exception as to strikes and epidemics and the receivers are bound by the charter. By the custom and practice of the port, as admitted by the respondents in the case of a single receiver, the shipowner and the

1919
VAN
LIEWEN
v.
HOLLIS
BROTHERS
AND
COMPANY,
LD.

H. L. (E.) 1919
 VAN
 LIEWEN
 v.
 HOLLIS
 BROTHERS
 AND
 COMPANY,
 LD.

receiver respectively agree that they will perform the several duties thereby cast upon them and they are not excused by causes beyond their control. In each case the duty imposed by the custom is an absolute and not a qualified duty. No personal default is charged against the respondents, but, inasmuch as they have contracted to procure a continuous supply of bogies and have not qualified that promise in any way, they are bound to fulfil their contract though they cannot get the bogies. As regards a single receiver *Beatley v. Bryson, Jameson & Co.* (1) and *Aktieselskabet Hekla v. Bryson, Jameson & Co.* (2) are directly in point. *Postlethwaite v. Freeland* (3) is not inconsistent with this view.

[LORD DUNEDIN referred to *J. & A. Wyllie v. Harrison & Co.* (4)]

Kruuse v. Drynan & Co. (5) supports the appellant's contention.

As to the objection that the custom does not apply to a case where there are several receivers the Bills of Lading Act, 1855, s. 1, shows that every obligation of the charterer is passed on to every indorsee of a bill of lading. The charterparty imports the custom of the port and the bills of lading import the charterparty: *Porteus v. Watney*. (6)

MacKinnon K.C. and *W. H. Owen* for the respondents.

An undertaking to discharge with customary steamship despatch as fast as the steamer can discharge and according to the custom of the port is a recognized form of undertaking to discharge in a reasonable time in the circumstances and involves no liability for demurrage unless the charterer, or in this case the receiver, is in default. The language of the custom is not sufficiently precise to convert this obligation into a guarantee of performance in a fixed time. The receiver is liable for a breach of this obligation only so far as it is within his power of performance. *Hulthen v. Stewart & Co.* (7) ; *Lyle Shipping Co. v. Cardiff Corporation* (8) ;

(1) Unreported. Mathew J. Dec. 16, 1896; C. A. March 23, 1897.

(2) (1908) 14 Com. Cas. 1.

(3) (1880) 5 App. Cas. 599, 613.

(4) (1885) 13 R. 92.

(5) (1891) 18 R. 1110.

(6) (1878) 3 Q. B. D. 534, 538.

(7) [1903] A. C. 389, 394.

(8) [1900] 2 Q. B. 638, 644.

Good & Co. v. Isaacs (1); *Castlegate Steamship Co. v. Dempsey* (2). *Wright v. New Zealand Shipping Co.* (3) can only be supported, as explained by A. L. Smith L.J. in *Lyle Shipping Co. v. Cardiff Corporation* (4), on the ground that it was not shown that the cargo owners had done their best as regards the discharge of the cargo. The obligation imposed by the custom does not apply to multiple receivers. There cannot be imposed upon the holders of various bills of lading an obligation by which each must nominate a dock and procure a quay berth and appliances, as such nominations might be conflicting. Moreover no such burden ought to be cast upon a small receiver. [They also referred to *Serraino & Sons v. Campbell*.(5)]

H. L. (E.)
1919
VAN
LIEWEN
v.
HOLLIS
BROTHERS
AND
COMPANY,
LD.

Harney replied.

The House took time for consideration.

1919. Dec. 12. VISCOUNT HALDANE. My Lords, I have had the advantage of reading the judgment which my noble and learned friend Lord Dunedin proposes to deliver relative to the implications of the charterparty and custom of the Port of Hull, and on this question I do not desire to add anything to what I understand him to be about to say. If his view of these is the true one, then I think that a conclusion which is fatal to the appeal may be rested on a single point.

Since this House decided *Hulthen v. Stewart & Co.* (6) it must be taken to be the law that charterparties fall into two classes. There are some that prescribe a definite time, generally measured by a certain number of days, within which the discharge is to be taken by the charterers. The obligation is in that case an unqualified one, and, if the time fixed is exceeded, demurrage is payable, irrespective of the circumstances. But the charterparty may merely stipulate that the discharge is to be taken "with all despatch," or "as fast as the vessel can deliver according to the custom

(1) [1892] 2 Q. B. 555.

(2) [1892] 1 Q. B. 854.

(3) (1878) 4 Ex. D. 165.

(4) [1900] 2 Q. B. 638, 644.

(5) [1891] 1 Q. B. 233.

(6) [1903] A. C. 389.

H. L. (E.) of the port," or may embody language which, as in these expressions, does not either name a period of time, or necessarily imply one of an altogether inelastic character. In such a case the liability of the charterer is treated as being only an obligation to take delivery with the utmost despatch practicable, excluding affection by circumstances not under the control of the charterer. If a liability not qualified in this fashion is to be imposed, the language employed must be definite on the point and free from ambiguity.

1919
VAN
LIEWEN
v.
HOLLIS
BROTHERS
AND
COMPANY,
LD.
Viscount
Haldane.

My Lords, the charterparty under construction belongs to the second of these classes. Neither by its terms, nor by the custom of the Port of Hull, as proved at the trial before the learned county court judge, is a definite and unqualified period of time prescribed within the meaning of the rule of construction as stated. It makes no difference to the general character of the obligation that there is a special clause in the charterparty providing for strikes and epidemics.

This consideration disposes of the argument of the appellant, and makes it unnecessary to consider any other point raised.

I think that the Appeal ought to be dismissed with costs.

LORD DUNEDIN. My Lords, I think it unnecessary to restate the facts, which are fully set out in the judgments of the Courts below.

The first point to settle is what was the extent of the admission made at the trial. I hold, without hesitation, that the respondents, through their counsel, admitted that there was a custom at Hull in connection with the discharge of wood cargoes, and that that custom is accurately set forth in the statement issued by the representatives of the Timber Trade Federation and the Documentary Committee of the Chamber of Shipping. Such an admission was most proper to give. Bray J. had found the custom and it would have been otiose to have insisted upon the re-proving of the custom. But to give this admission the

further effect of saying that it was an admission which barred the respondents from contending that the law applied to the case by *Bray J.* was wrong, is, in my view, quite out of the question, and I ought to add that the learned counsel for the appellant did not so press it. On the other hand the admission accepted was sufficient proof of the custom, and I cannot understand the view of the Court of Appeal that the custom to the extent of what was contained in the document remained unproved.

Now it is admitted that the words "the steamer shall be discharged with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours of the port" import an obligation that the charterers shall use all reasonable despatch, but reasonable must be reasonable under all the circumstances of the case. The appellant puts his case on the succeeding words "according to the custom of the respective ports," and, finding in the custom of Hull, as stated, that it is the duty of the receiver of cargo to supply and have ready a clear quay space the full length of the steamer and a sufficient and continuous supply of bogies, he argues that this is a superadded absolute obligation the object of which cannot be excused by its being impeded by causes over which the receiver of cargo has no control.

My Lords, I think the question is really quite concluded by authority. The only difficulty that has arisen is from the rather uncertain doctrine which was laid down in some of the decided cases, and especially from *Wright v. New Zealand Shipping Co.* (1) I do not think I should serve any useful purpose by examining and stating the somewhat numerous authorities. I will go at once to the cases in your Lordships' House which, in my opinion, settle the law. The most recent is *Hulthen v. Stewart & Co.* (2) That case, as this, contained the obligation for customary discharge according to the custom of the port, which there also was the port of Hull. Indeed, the document there construed was a White Sea Wood Charter, commonly called Merblanc,

H. L. (E.)
1919
VAN
LIEWEN
v.
HOLLIS
BROTHERS
AND
COMPANY,
LD.
Lord Dunedin.

(1) 4 Ex. D. 165.

(2) [1903] A. C. 389.

H. L. (E.) 1919
 VAN LIEWEN
 v.
 HOLLIS BROTHERS
 AND COMPANY,
 LD.
 Lord Dunedin.

which is a sister of the charter in the present case, commonly called Scanfin. The cause of delay was the crowded state of the port. The argument put forward that the normal period of discharge could be expressed in terms of days and then constituted an absolute obligation was rejected, it having been found as a fact that the charterers had done all that they reasonably could to discharge the vessel, and the existence of a strike clause being held to make no difference. The general proposition was laid down by Lord Macnaghten as follows (1): "It is, I think, established that, in order to make a charterer unconditionally liable, it is not enough to stipulate that the cargo is to be discharged 'with all despatch,' or 'as fast as steamer can deliver,' or to use expressions of that sort. In order to impose such a liability the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished."

It was just possible in the present case to try to distinguish that case by saying that the impediment there was unconnected with the special duty undertaken by the charterers under the custom—namely, to provide bogies. The passage which exactly deals with such a case as the present will be found in the words of Lord Selborne in *Postlethwaite v. Freeland* (2) where he quotes the words of Blackburn J. in *Ford v. Cotesworth*. (3) "If, by the terms of the charterparty, the charterer has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there is no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time; that is (as was said by Mr. Justice Blackburn in *Ford v. Cotesworth* (3)) 'a reasonable time under the circumstances.' Difficult questions

(1) [1903] A. C. 394.

(2) 5 App. Cas. 599, 608.

(3) (1868) L. R. 4 Q. B. 127,
 133.

may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of reasonable diligence, ought, I think, to be taken into consideration.”

H. L. (E.)
1919
VAN
LIEWEN
v.
HOLLIS
BROTHERS
AND
COMPANY,
LD.
Lord Dunedin.

Now that passage from *Ford v. Cotesworth* (1) was approved and quoted by A. L. Smith L.J. in *Lyle Shipping Co. v. Cardiff Corporation* (2) as well as by Lord Selborne in *Postlethwaite v. Freeland* (3) in this House, and Lord Blackburn in the same case, while naturally adhering to his own view in *Ford v. Cotesworth* (1), does, in explaining *Ashcroft v. Crow Orchard Colliery Co.* (4), give the only ground on which *Wright's Case* (5) can be supported—namely, the view that on the facts the charterer failed through what he calls a self-imposed inability. That is really viewing the expression “overcome by the use of reasonable diligence” from, so to speak, the other side, and makes the whole of the cases, if that view of the facts in *Wright* (5) is taken, consistent. If that view of the facts is not possible, then *Wright* (5) as an authority must disappear, for we have the dictum in *Ford v. Cotesworth* (1) approved both by the Court of Appeal and by this House, and the same thing said by Lord Macnaghten again in this House in *Hulthen*. (6)

It follows that the unreported judgment of the case (*Beatley v. Bryson, Jameson & Co.*) decided by Mathew J. and the Court of Appeal under the Presidency of Lord Esher, cannot, in my view, be supported. The view I have taken makes it unnecessary to consider the further question argued as to whether the custom, being proved as regards one receiver of cargo, held good in the case where there were more than one receiver of cargo under separate bills of

(1) L. R. 4 Q. B. 127, 133.

(2) [1900] 2 Q. B. 638, 644.

(3) 5 App. Cas. 599.

(4) (1874) L. R. 9 Q. B. 540.

(5) 4 Ex. D. 165.

(6) [1903] A. C. 389.

H. L. (E.) lading. I am not satisfied that the above statement of the proposition is accurate. After all a custom consists in a method of doing something, and the question whether the ensuing legal result which applies in the case of one will apply in the case of many, is, I rather suspect, a question for the law to decide and not for a custom to prove. In any view I reserve my opinion on this matter until it is necessary to decide it.

1919
 VAN
 LIEWEN
 v.
 HOLLIS
 BROTHERS
 AND
 COMPANY,
 LD.
 Lord Dunedin.

For these reasons I am of opinion that the result reached by the Court of Appeal was right, although I cannot tread the path which they took to reach it.

The Appeal should be dismissed.

LORD ATKINSON. My Lords, in this case all the provisions contained in the charter party are expressly incorporated in the bills of lading of which the three defendants are indorsees. There is no such inconsistency or conflict between the provision of these bills of lading and the charterparty as existed in the case of *Serraino & Sons v. Campbell* (1), to which your Lordships have been referred. In that case "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever" were expressly excepted in the bill of lading; then followed the words "and all other conditions as per charter." The charterparty contained not only the same exceptions as the bill of lading, but the further exceptions, namely, "strandings and collisions, and all losses and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." Owing to the negligence of the master the ship was stranded and the cargo lost. The plaintiffs who sued the shipowners for the loss of their goods, part of the cargo, were the indorsees of the bill of lading, but strangers to the charterparty, and it was held on review of all the authorities that the words "all other conditions as per charterparty" did not incorporate into the bill of

(1) [1891] 1 Q. B. 283.

lading the exception "stranding occasioned by the negligence of the master," and that the shipowners were consequently liable to the plaintiffs.

No such conflict or inconsistency as this exists between the provisions of the bill of lading and the charterparty in the present case. It is untouched by this authority, and the present respondents are therefore bound by the terms of the charterparty. The nature and extent of the duties imposed upon charterers touching the discharge of the cargo from the ships they have chartered are well established.

If by the terms of the charterparty the charterers have agreed to discharge the chartered ship within a fixed period of time, that is an absolute and unconditional engagement for the non-performance of which they are answerable, whatever be the nature of the impediments which prevented them from performing it, and thereby causing the ship to be detained in their service beyond the time stipulated. If no time be fixed expressly or impliedly by the charterparty the law implies an agreement by the charterers to discharge the cargo within a reasonable time, having regard to all the circumstances of the case as they actually existed, including the custom or practice of the port, the facilities available thereat, and any impediments arising therefrom which the charterers could not have overcome by reasonable diligence: *Postlethwaite v. Freeland* (1); *Hick v. Raymond & Reid* (2); and *Hulthen v. Stewart & Co.* (3)

In the last of these three cases the charterparty provided that the cargo was to be "discharged with customary steamship despatch as fast as the steamer can deliver during the ordinary working hours" of the port of discharge "but according to the custom" of the port "Sundays, general or local holidays (unless used) excepted." These are very precise and peremptory words, much better calculated to impose an absolute and unconditional obligation than are the words upon which, in my view, the question for decision in the present case turns. Lord Macnaghten held in *Hulthen*

H. L. (E.)

1919

VAN

LIEWEN

v.

HOLLIS

BROTHERS

AND

COMPANY,

LD.

Lord Atkinson.

(1) 5 App. Cas. 599.

(2) [1893] A. C. 22.

(3) [1903] A. C. 389.

H. L. (E.) v. *Stewart* (1) that the meaning of the above-mentioned words was not tantamount to fixing a certain definite number of days or hours as the period within which the discharge of the vessel was to be accomplished. What these words pointed to was, he said, "the discharge of the cargo with the utmost despatch practicable, having regard to the custom of the port, the facilities for delivery possessed by the particular vessel under contract of affreightment, and all other circumstances in existence at the time not being circumstances brought about by the person whose duty it is to take delivery or circumstances within his control." The learned judge who tried the case (Phillimore J. as he then was) had found as a fact that the respondents had done all they reasonably could do to discharge the vessel. In the present case the trial Judge has found that the respondents were not responsible for ordering the ship into dock, and that the delay in the discharge of the ship was not due in whole or in part to circumstances over which they or the charterers had control. Having regard to this finding I think the first question for decision in this case resolves itself into this. Do the words of the written statement as to the custom and practice concerning the discharge of steamships laden with wood cargoes existing at the Port of Kingston-upon-Hull impose upon the charterers of the *Lizzie*, and also upon the respondents who are bound by the terms of the charterparty, an obligation to discharge this ship as absolute and unconditional in character as if a definite number of days had been fixed for her discharge? It has been contended that they do impose such an obligation because the paragraph headed "Discharging Berth" imposes an absolute duty upon the receiver of the cargo to provide or arrange (on or before the arrival of the ship) a vacant available and suitable berth to which she can forthwith proceed and be at liberty to forthwith commence her discharge, and that there is a correlative duty of the same absolute character imposed upon the receiver to enable the ship to take advantage of this liberty.

(1) [1903] A. C. 389.

My Lords, I think that contention is unsound. It is not thus that absolute unconditional obligations can be spelt out and imposed. Adopting the words of Lord Macnaghten in the judgment from which I have already quoted, I may say that in order to impose the liability contended for, the language used "must in plain and unambiguous terms define and specify the period within which delivery of the cargo is to be accomplished." The language relied upon in this case is not of this character.

H. L. (E.)
1919
VAN
LIEWEN
v.
HOLLIS
BROTHERS
AND
COMPANY,
LD.
Lord Atkinson.

I therefore think that the appeal upon this point fails, and, that being so, it is unnecessary to deal with the second point—namely, the possibility of holding the consignees as liable as one consignee would be. I think the appeal should be dismissed with costs.

LORD WRENBURY. My Lords, I agree, and I have not thought it necessary to prepare any independent judgment of my own.

LORD BUCKMASTER. My Lords, I had prepared and written an independent opinion in this case, but after reading the opinions of the other noble and learned Lords who have preceded me I realized that I had only clothed in different words exactly what they had already expressed. In such circumstances it would be vain repetition to deliver my opinion to the House, and I therefore content myself with expressing my entire agreement with the proposed motion and with the reasons urged in its support.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 12, 1919.

Solicitors for the appellant : *Botterell & Roche, for Andrew M. Jackson & Co., Hull.*

Solicitors for the respondents : *Trinder, Capron & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*	NORTH STAFFORDSHIRE RAILWAY	} APPELLANTS ;
1919 Dec. 3.	COMPANY	
	AND	
	EDGE	RESPONDENT.

*Railway—Rates—Increase—Inequality of Charge—Compromise—Railways
Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 90—Appeal—
Practice—Point of Law not raised at Trial.*

By s. 90 of the Railways Clauses Consolidation Act, 1845, it is lawful for a railway company to alter their tolls, provided that all such tolls be at all times charged equally to all persons, and after the same rate, in respect of all goods of the same description and conveyed by a like carriage passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person using the railway.

A railway company from July 1, 1913, onwards increased the rates for carriage of coal and coke to places beyond their railway. A number of colliery owners objected to the increased rates and took proceedings to challenge them. These proceedings were compromised by an agreement whereby (1.) for traffic after December 31, 1915, the colliery owners were to pay a rate of $\frac{1}{2}d.$ per ton above the original rate on all coal and coke they should send from their collieries to places beyond the railway; (2.) for traffic from July 1, 1913, to January 1, 1916, the colliery owners were to pay a rate of $\frac{1}{2}d.$ per ton above the original rate on all coal and coke they had sent carriage paid by them to places beyond the railway. These payments were to be in satisfaction of the increased rates and of increased charges for services at the private sidings of the colliery owners. The rates specified in the agreement were less than the increased rates. The railway company also agreed to repay to two of the colliery owners amounts which had been paid by them in excess of the amounts specified in the agreement.

A coal merchant who sent coal and coke from the collieries of the owners to places beyond the railway, and who was no party to the agreement, had also objected to and refused to pay the increased rates. The railway company sued him for the full amount of the increase:—

Held, that the increased rate was not charged equally to all persons under the same circumstances, and was not authorized by s. 90 of the Act; that the inequality was not justifiable merely as being due to a compromise; and that the plaintiffs could recover no more than was being charged to the colliery owners under the agreement.

resent: LORD BIRKENHEAD L.C., LORD DUNEDIN, LORD ATKINSON,
and LORD BUCKMASTER.

Held, further, that the contention that the section did not apply to through rates was not open to the plaintiffs on appeal, inasmuch as the point was not raised at the trial.

Observations on the practice of the House as to permitting parties to raise points of law not raised in the Courts below.

Decision of the Court of Appeal [1919] 1 K. B. 367 affirmed.

H. L. (E.)
1919
NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.
EDGE.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Rowlatt J.

The respondent was a coal factor carrying on business at Manchester. For many years past the appellants, the North Staffordshire Railway Company, had carried coal and coke for the respondent from the North Staffordshire coal-fields to various destinations in England and Wales, and they delivered to him monthly accounts. In May, 1913, the appellants gave notice pursuant to the Railway and Canal Traffic Act, 1888, and the Order of the Board of Trade thereunder, dated January 25, 1889, of their intention to increase the rates charged for (inter alia) the carriage of coal and coke, and these increased rates came into operation on July 1, 1913. For the period from July 1, 1913, to December 31, 1915, the appellants carried considerable quantities of coal and coke for the respondent, and in the monthly accounts which they delivered to him they charged him the increased rates. The respondent refused to pay the increased charges, and deducted from each of the monthly accounts the difference between the rates in force before July 1, 1913, and the increased rates. This difference for the whole of the period in question amounted to 643*l.* 0*s.* 5*d.* In March, 1914, the North Staffordshire Colliery Owners' Association (an Association consisting of some twenty-three colliery owners in North Staffordshire) commenced proceedings against the appellants before the Court of the Railway and Canal Commission, impeaching the increase of rates on various grounds. The respondent was not a party to these proceedings. Eventually these proceedings were compromised on the terms of an agreement dated February 11, 1916, and made between the appellants and the Association. By this agreement it was agreed, without prejudice to the legal

(1) [1919] 1 K. B. 367.

H. L. (E.)
1919
NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.
EDGE.
—

rights and liabilities of either party, that in consideration of the colliery owners paying to the railway company, subject to the maximum rates for conveyance authorized by their Rates and Charges Orders Confirmation Act of 1892, as from January 1, 1916, and during the continuance of the agreement, the sum of one half-penny per ton on all coal and coke they dispatched from their respective collieries to all places situated beyond the North Staffordshire Railway, in addition to the payments at the rates in force on June 30, 1913, the railway company would accept the said additional payments in satisfaction of all claims for increases in the rates of conveyance during the continuance of the agreement on all the coal and coke dispatched from the said collieries, whether the rates were payable by the consignor or the consignee. The railway company agreed that the said payments should also be accepted in satisfaction of all claims for new charges or increase on the charges made at June 30, 1913, to any of the parties thereto or others for services rendered on coal and coke traffic at the private sidings of the said collieries. And it was also agreed that in respect of the period from July 1, 1913, to December 31, 1915, both dates inclusive, the colliery owners would (subject to the maximum rates as aforesaid) pay to the railway company the sum of one-eighth of a penny per ton on all coal and coke which the colliery owners dispatched from their respective collieries carriage paid by them to all places situate beyond the North Staffordshire Railway (such payment to be in addition to the proper charges at the rates in force on June 30, 1913) in satisfaction of all claims for increase of rates or new and increased charges at the private sidings of the said collieries in respect of all coal and coke traffic from such collieries the carriage on which had been paid or was payable by the colliery owners. The railway company also agreed to repay to Settle, Speakman & Co. and to the Fenton Collieries, Ltd. (two of the colliery owners parties to the agreement), the amount of increases of rates or charges paid by them in excess of the amounts thereinbefore agreed to be paid. It was further provided that the agreement should remain in force

for two years from January 1, 1916, and thereafter until terminated by either party giving to the other six months' notice in writing to terminate the agreements to expire on December 31 in any year. Both the rates mentioned in the agreement were less than the rates charged to the respondent.

On May 9, 1917, the appellants commenced an action against the respondent to recover the sum of 643*l.* 0*s.* 5*d.* deducted by the respondent from the monthly accounts during the period from July 1, 1913, to December 31, 1915. By his defence the respondent alleged (*inter alia*) that the appellants had not charged the said increases to all persons equally in respect of coal or coke passing under the same conditions over the same line of railway, and that in respect of the period July 1, 1913, to December 31, 1915, the said increases of rates in respect of coal and/or coke so carried by the appellants for the respondent as aforesaid were illegal and irrecoverable by reason of s. 90 of the Railways Clauses Consolidation Act, 1845. Whilst denying all liability, the respondent brought into court the sum of 110*l.*, and said that the same was sufficient to satisfy the appellants' claim or cause of action if any. In further alternative the respondent counterclaimed the said sum of 643*l.* 0*s.* 5*d.* as over-charges.

The appellants by their reply joined issue on the defence, and by way of defence to the counterclaim denied that there had been any infringement of s. 90 of the Railways Clauses Consolidation Act, 1845.

Rowlatt J. held that the respondent could not lawfully be charged more than one-eighth of a penny per ton, inasmuch as any higher charge was not charged equally to all persons, and was an infringement of s. 90, and his judgment was affirmed by the Court of Appeal (Bankes, Warrington, and Scrutton L.JJ.).

In the Court of Appeal the appellants contended for the first time that s. 90 of the Railways Clauses Consolidation Act, 1845, did not apply to through rates, but the Lords Justices held that the evidence necessary to enable the point to be taken successfully was not before the Court.

H. L. (E)

1919

NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.
EDGE.

H. L. (E.)
1919
NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.
EDGE.
—

1919. Nov. 17, 18. *Sir John Simon K.C.* and *Macmorran K.C.* (with them *W. E. Vernon*) for the appellants. The sole defence to the appellants' claim is that the appellants have acted in contravention of s. 90 of the Railways Clauses Consolidation Act, 1845, and reliance is placed on the compromise of February 11, 1916, as showing that the appellants were not charging all their customers alike, as required by the section. But, first, the compromise was effected after the period in respect of which the respondent was charged, and it has not the bearing alleged. It related to a variety of matters in controversy past and future with the result that a lower rate was charged. It must be read as a whole, and the respondent is not at liberty to pick out one of several items of the compromise and to rely on that as establishing an inequality of charge: *Hohvell Iron Co. v. Midland Ry. Co.* (1) Secondly, s. 90 does not apply to through rates over more than one railway. The section extends only to haulage over a defined portion of the railway authorized by the private Act of the railway company; it has been rigidly construed by the Courts, and the result is that it provides an extremely stiff and intractable rule. It was for this reason that further restraints were placed upon the railway companies as regards undue preference by the Railway and Canal Traffic Act of 1854. It is important to keep the two statutes distinct: *Murray v. Glasgow and South Western Ry. Co.* (2); *Finnie v. Glasgow and South Western Ry. Co.* (3); *Denaby Main Colliery Co. v. Manchester, Sheffield and Lincolnshire Ry. Co.* (4) In *Taylor v. Metropolitan Ry. Co.* (5) the point whether the section applied to a through rate was argued, but the decision proceeded on other grounds: see also *Hull, Barnsley, etc., Ry. and Dock Co. v. Yorkshire and Derbyshire Coal and Iron Co.* (6) If the respondent had any complaint of undue preference against the appellants his proper remedy was to have gone before the Railway and Canal Commission: *Lancashire and Yorkshire Ry. Co. v. Greenwood & Sons.* (7)

(1) [1909] 1 K. B. 486.	(4) (1885) 11 App. Cas. 97, 111.
(2) (1883) 11 R. 205, 210.	(5) [1906] 2 K. B. 55, 61.
(3) (1855) 2 Macq. 177, 183.	(6) (1887) 18 Q. B. D. 761.
(7) (1888) 21 Q. B. D. 215.	

G. J. Talbot K.C. (with him *A. T. Miller K.C.*) for the respondent. It is said (1.) that what was done by the appellants in this case did not offend against the Act of 1845 because the terms given to the colliery owners were the result of a compromise dealing with a large number of matters; (2.) that, the transits being transits over more than one railway, s. 90 does not apply. Dealing first with the second point, the respondent submits that it is not open to the appellants as it was not raised on the pleadings, and was not and could not have been taken in the Court of first instance. The jurisdiction of the House to entertain the point is not contested, but raising on appeal a new point not raised in the Court of first instance puts litigants in a position of great difficulty and embarrassment, and deprives the House of the assistance of the opinions in the Courts below, and this House in the exercise of its discretion will not, unless in exceptional circumstances, allow the point to be argued. Assuming that the point is open, it is admitted that the rates in question were through rates, but if the point had been raised at the trial it could have been shown by evidence that the whole inequality arose in the rate charged to the traders in respect of the transit on the appellants' own railway, inasmuch as the appellants alone of all the railway companies charged an increased rate on coal and coke. Therefore the rates, the inequality of which is complained of, are rates charged by the appellants for carriage on their railway, and these rates are not through rates in any relevant sense. The section was intended to secure that where there is an identity of service there should be an identity of charge, and there is no reason why it should not apply to a transit from A. to C. on two railways. The through rate is entirely for the convenience of the trader, and contracts by a railway company to whose railway the goods were originally consigned to get the goods to some point off the railway were known ever since the beginning of railways: *Muschamp v. Lancaster and Preston Junction Ry. Co.* (1) In *London and North Western Ry. Co. v. Evershed* (2),

H. L. (E.)

1919

NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.
EDGE.

(1) (1841) 8 M. & W. 421.

(2) (1878) 3 App. Cas. 1029.

H. L. (E.) 1919
NORTH STAFFORD-SHIRE RAILWAY COMPANY
v.
EDGE.

where many of the rates under consideration were through rates, no question was raised as to the applicability of the section to through rates. It was there held that an inequality as regards charges of carting from the station could not be justified under the section. That case is a fortiori.

[Counsel for the respondent were not called on on the question of the compromise.]

Macmorran K.C. in reply. It was assumed throughout that the rates in question were through rates. It was known that the other railway companies had not increased their rates for coal and coke and that the appellants had, and no evidence was required as to that. This point is really open to the appellants on the pleadings as they stand. [He referred to *Phipps v. London and North Western Rly. Co.* (1)]

The House took time for consideration.

1919. Dec. 8. LORD BIRKENHEAD L.C. My Lords, this is an appeal from an order dated December 9, 1918, of the Court of Appeal affirming the judgment dated July 25, 1918, of Rowlatt J. The facts are fully set out in the judgments in the Courts below, and I do not restate them here.

The principal question which requires decision is whether the appellants are entitled to recover from the respondent certain sums representing increases of rates on traffic consigned by him to the appellants between July 1, 1913, and the end of 1915. The contention for the respondent upon this part of the case is that the appellants, on February 11, 1916, entered into an agreement with certain traders in compromise of an application made by them to the Railway Commissioners. It is urged that the effect of the agreement was that the appellants charged the companies for whose benefit the agreement was made a lower rate than they charged to the respondent. Such an agreement, it was contended, and the practice giving effect to it, involved an infringement of the provisions of s. 90 of the Railways Clauses Act, 1845. It was in the second place contended by the appellants that s. 90 had no application to the case

(1) [1892] 2 Q. B. 229.

of through rates, and that the rates under consideration in this matter were, in fact, through rates. To this it is replied by the respondent, first, that the section did apply, and had been treated by this House as applying, to such rates; secondly, that in any case this contention is not open to the appellants, on the grounds that it was not put forward before the trial Judge, that it was not raised in the pleadings, and that it is not included, or only very obscurely included, in the appellants' reasons summarising their contentions before your Lordships.

I deal with these points in order. Sect. 90 of the Railway Clauses Consolidation Act, 1845, is as follows: "And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

The effect of the agreement already referred to of February 11, 1916, was that the traders should, after January 1, 1916, pay an increased rate of one halfpenny per ton on all coal sent from their collieries to places situated beyond the

H. L. (E.)

1919

NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY

v.

EDGE.

Lord
Birkenhead
L.C.

H. L. (E.)
 1919
 NORTH
 STAFFORD-
 SHIRE
 RAILWAY
 COMPANY
 v.
 EDGE.
 ———
 Lord
 Birkenhead
 L.C.

North Staffordshire Railway, and that for traffic from July 1, 1913, to January 1, 1916, they should pay an increase of one-eighth of a penny per ton on all coal dispatched carriage paid by them to all places beyond the North Staffordshire Railway. Both the halfpenny and the eighth of a penny were less than the increase in rates claimed.

Now, my Lords, the only question that calls for decision under this part of the case is whether the respondent is being required to pay a higher price for the services rendered to him by the railway company than the price which under the agreement is required from other traders. It is sufficient for me to say that in my opinion it is impossible so to construe the agreement which I have summarised as to answer this question negatively. It is the policy of Parliament that traders as a matter of indisputable right shall receive equal treatment. This agreement effects a differentiation to the prejudice of the respondent, and it cannot be supported. It was argued that the agreement was a general compromise covering a number of matters, only one of which is a reduction of rate, and that, therefore, the familiar doctrine does not apply. To give effect to this contention would be to hold that every railway company could evade s. 90 by entering into omnibus agreements with favoured traders, including in one of their clauses a rate preference.

I address myself now to the second contention—namely, that s. 90 has no application to through rates. But I have only to say that I do not attempt to reach a decision upon the merits of this branch of the argument. Counsel for the respondent has argued that *London and North Western Ry. Co. v. Evershed* (1) shows by a fortiori reasoning that the appellants' contention under this head is ill founded. I express no opinion upon this submission, because I have formed the clear view that, having regard to the history of this litigation, your Lordships ought not to treat the contention as one which is open to the appellants. It is admitted that it was not put forward in the original pleadings. It is admitted that no such argument was advanced before the

(1) 3 App. Cas. 1029.

trial Judge. An attempt indeed was made to present the argument to the Court of Appeal, but that tribunal refused, and in my opinion rightly refused, to be influenced by an attempt so belated. I share their view for many reasons, to some of which I attempted to give expression in *Wilson v. United Counties Bank*. (1) An attempt was made in the argument to distinguish the doctrines there laid down from those which it was said ought to govern the present case, on the ground that the issue here was a simple point of law of such a kind that the respondent could sustain no possible prejudice by the postponement of its discussion to the appellate stage. It is sufficient to say, in reply to this contention, that there are very few cases of which it can be confidently stated that a failure to raise a relevant contention at the appropriate stage will not prejudice the other litigant. It is, for instance, argued in this case that a proper order for costs would compensate the respondent for the expenses of the litigation unnecessarily incurred, on the hypothesis that, being informed at first instance of the true contention, he might have been advised to abandon his claim. I do not think it necessary to point out that this suggestion may possibly in another case require qualification or consideration, having regard to the notorious incompleteness of the indemnity furnished by our present system of costs, because in the present case counsel for the respondent satisfied me that there was reasonable ground for supposing that he might have been able to strengthen his case upon this branch of it by calling parol evidence. But I desire to draw attention to a consideration which in my view is both more general and more important. The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of appellate tribunals to require that the judgments of the judges in the Courts below shall be read. The efficiency and the authority of a Court of Appeal, and especially of a final Court of Appeal,

H. L. (E.)^a

1919

NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.

EDGE.

Lord
Birkenhead
L.C.

(1) [1920] A. C. 102; 88 L. J. (K. B.) 1033.

H. L. (E.) are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below. Decisions of this House have laid it down that in very exceptional cases, and in spite of the considerations above referred to, new matters may be considered by your Lordships: see the judgment of Lord Halsbury in *Sutherland v. Thomson* (1) and the judgment of Lord Watson in *Connecticut Fire Insurance Co. v. Kavanagh*. (2) I have carefully examined the cases upon the subject which have been decided in this House, and my examination of them has led me more and more to the conclusion that such attempts must be vigilantly examined and seldom indulged.

For these reasons I move your Lordships that the appeal be dismissed with costs.

LORD DUNEDIN. My Lords, on the point which forms the judgment of the learned judges of the Court of Appeal I agree with them and have nothing to add.

The outcome of the compromise was practically the fixing of a rate, and that rate the respondent had a right to compare with the rate charged to him for carriage between the same points under the same circumstances.

Before your Lordships' House, however, the appellants wished to raise another and a formidable point—namely, that s. 90 did not apply to through rates, that is, the rate when the termini of the journey are on different railways. It was objected on the part of the respondent that the point had not been taken in the Court of first instance, and had been rejected by the Court of Appeal on that ground. This raises what, in my opinion, is a very important question, as to which there ought to be a settled rule of practice.

My Lords, I personally think it is much to be regretted that the modern forms of pleading in England do not afford

(1) [1906] A. C. 51.

(2) [1892] A. C. 473.

1919
NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.
EDGE.
—
Lord
Birkenhead
L.C.
—

that clear statement of the grounds of fact and the propositions in law on which the respective parties rely which was afforded by the older methods and which is to-day secured by the forms of pleadings in Scotland.

That view, however, may seem to your Lordships a stranger's criticism, as the reform, if any, must come from those who make rules of Court, and cannot be introduced by means of a judgment of this House. In this case the point is not taken in the pleadings. We are also informed that it was not put forward in argument in the Court of first instance, but in the Court of Appeal it was mooted and, as already stated, rejected as not having been before the Court below. I do not think that I am entitled to say that what the Court of Appeal did was wrong, but I confess I have doubts as to whether it was expedient. May I be allowed to say that in such a matter I am not without practical experience. During the nine years I sat as President in the First Division of the Court of Session such a case happened more than once. Now it is true that the situation is, in Scotland, expressly dealt with by statute. By the 29th section of the Court of Session Act, 1868 (31 & 32 Vict. c. 100), it is provided, omitting unnecessary words: "The Court or the Lord Ordinary"—that is, in other language, the Court of Appeal and the judge of first instance—"may at any time amend any error or difficulty in the record"—now an omitted plea in law is a defect in the record—"upon such terms as to expenses or otherwise as to them shall seem proper, and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made."

That law is not binding on an English Appeal Court. It represents in my humble judgment the better rule. Yet, as matters stand, it must be a question for the discretion of the Court, and viewing it as that, I should consider it one not for me sitting here to interfere.

When, however, the case comes to this House I think the matter is different. If the omission be a mere omission to

H. L. (E.)

1919

NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANYv.
EDGE.

Lord Dunedin.

H.L. (E.)
 1919
 NORTH
 STAFFORD-
 SHIRE
 RAILWAY
 COMPANY
 v.
 EDGE.
 Lord Dunedin.

state and argue a legal proposition which requires for its discussion no underlying hypothesis of facts other than those which have been admitted or proved in the Courts below, I should hold that your Lordships should not turn a deaf ear to such argument even at the eleventh hour. But if the proposition is such that a variation in the admitted or proved facts, or any addition to them, would affect the argument, then I think it is too late, and that your Lordships should not allow the argument to be put forward.

That, my Lords, is, I think, the position here. Mr. Talbot says that had he been given notice of the point he would have been in a position to prove that the increased rate as it was was entirely on the North Staffordshire bit of the land. Whether that is the case or not I do not know. Neither do I necessarily say that it would alter the result, but it is obviously something which would give rise to a very statable argument. By the default of the appellants the facts on which that argument is founded are not, and cannot at this stage be, before us. In very exceptional cases it might be that we should remit the case or even take the evidence ourselves. I have no doubt that we have the power. But in a case like this, where the stake is comparatively small, where the same state of facts is not at all likely to recur so as to govern future cases, and where the omission to plead was quite the fault of the railway company if they wished to raise the point, I think any remit is out of the question.

I am therefore in accordance with your Lordships that the point ought not to be allowed to be raised here.

I reserve my opinion on the merits of the point if it should ever be necessary to decide it.

LORD ATKINSON. My Lords, I too concur with the judgment of the Court of Appeal on the points raised before it other than the new point.

The rules which should guide your Lordships in the exercise of your discretion as to permitting parties to raise upon appeals to this House points not raised in the tribunal

appealed from, or not raised even in the Court of first instance where evidence was taken and issues of fact decided, are, I think, well established.

In the case of *The Tasmania* (1) Lord Herschell in clear words enunciated the rule. That was a case of a collision between two vessels, named respectively the *City of Corinth* and the *Tasmania*. The learned judge who tried the case found that the *City of Corinth* was alone to blame for improperly starboarding and so bringing herself across the course of the *Tasmania* instead of getting out of her way. The Court of Appeal took the same view, and it was not contended in this House that this finding could be disturbed. In the Court of Appeal, for the first time, the point was raised that the *Tasmania* was also to blame, inasmuch as upon the evidence she had kept her course too long, and ought to have put her helm down and come into the wind earlier than she, in fact, did. Lord Herschell said: "My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is generally governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them. It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

My Lords, in the present case it seems to me impossible to say either that the House has before it all the facts bearing on the new contention as completely as would have been the case had it been raised at the trial; and next, that no

H. L. (E.)

1919

NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANYv.
EDGE.

Lord Atkinson.

H. L. (E.)
1919
NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.
EDGE.
Lord Atkinson.

satisfactory explanation could have been offered by those whose conduct was impeached if an opportunity had been offered to them for explanation.

On the other hand it must be remembered that by the fourth section of the Appellate Jurisdiction Act of 1876 it is enacted that this House is to determine when an appeal is taken from the Court of Appeal "what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal." In *Connecticut Fire Insurance Co. v. Kavanagh* (1) Lord Watson said: "When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

In *Sutherland v. Thomson* (2) Lord Halsbury in delivering a judgment concurred in by Lords Macnaghten, Robertson and Lindley, said: "I should have felt more difficulty about the other point if it had been raised in the Court below. I do not in the least mean to say that it is an absolute objection against a good point, if it is a good point, to say that it has not been raised in the Court below, because this House ought to make such an order as ought to have been made originally. But the peculiarity of this case is that this is a question which could only have been settled by proof, and we are asked to overrule the judgment of the Court of Session by a suggestion on which, if it was well founded, the Court might have been asked to reverse the proceedings before the Lord Ordinary

(1) [1892] A. C. 473. 480.

(2) [1906] A. C. 51, 55.

and to order a proof. It is not merely a question of a point which is a good point, and remains a good point not being argued, but here something was to be done. If the objection was a good one, what the parties complaining ought to have done was to have put it before the Court of Session and asked the Court to do that which ought to have been done by the Lord Ordinary, namely, to allow a proof."

It is, no doubt, desirable that in every case coming on appeal before your Lordships, you should enjoy the great advantage of having before you the decision of the Court of Appeal upon all the points raised upon the appeal to this House. But it by no means follows that parties should never be permitted, in any case, to raise, and have decided here, questions which were not raised in the Court of Appeal, nor even in the Court of first instance, though this House should thereby lose the advantage of having before it the decisions of both these tribunals on the new point. This House cannot on this ground escape, in my view, from the duty (to use Lord Halsbury's words) "of making such an order as ought to have been made originally." In the present case the new point raised by the appellants is that s. 90 does not apply to through rates, and that the increased rate charged in the present case was in fact charged in respect of the haulage of the respondent's goods over lines other than, and in addition to, the lines of the appellant company. Otherwise it would not be a through rate at all. Mr. Talbot, however, alleges that, if he had had notice of this point he could have shown, on grounds which he indicates, that the increased charge is made in respect of the transit over the Staffordshire line, and that line alone. If that be so, the point is a bad point. Its goodness or badness depends accordingly on a controverted issue of fact which the railway company have failed to raise at the trial or to have determined upon evidence.

I think the case is completely covered by the authorities I have cited, and that the appellants ought not to be permitted to raise this new point now.

I think the appeal should be dismissed.

A. C. 1920.

H. L. (E.)

1919

NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY

v.

EDGE.

Lord Atkinson.

H. L. (E.)
1919
NORTH
STAFFORD-
SHIRE
RAILWAY
COMPANY
v.
EDGE.
—

LORD BUCKMASTER. My Lords, with the opinions expressed by other noble and learned Lords on the merits of this case I am in entire agreement. Upon the question as to whether the appellants should be permitted to raise here a contention not raised in the Court of first instance I find myself most closely in accord with the views just stated by my Lord Atkinson. Such a matter is not to be determined by mere consideration of the convenience of this House but by considering whether it is possible to be assured that full justice can be done between the parties by permitting new points of controversy to be discussed. If there be further matters of fact that could possibly and properly influence the judgment to be formed, and one party has omitted to take steps to place such matters before the Court because the defined issues did not render it material there, leave to raise a new issue dependent on such facts at a late stage ought to be refused, and this is settled practice. Subject to this it would not be wise in my opinion to fetter or restrain by fixed rule the discretion which this House enjoys, a discretion which it would always be anxious to exercise so as to avoid injustice being done.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Dec. 8, 1919.

Solicitors for the appellants : *Burchells.*

Solicitors for the respondent : *Parker, Garrett & Co., for Alexander Wilson & Cowie, Liverpool.*

[HOUSE OF LORDS.]

H. L. (E.)*

COLLIS APPELLANT ;

1919
Dec. 11.

AND

AMPHLETT RESPONDENT.

Common — Encroachment — Boundaries — Ditch Width — Presumption of Ownership.

Order of the Court of Appeal [1918] 1 Ch. 232 reversed on the evidence and judgment of Younger J. restored.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Younger J.

The action was brought by the appellant, the clerk of the Conservators of Clent Hill Common, suing on their behalf, against the late Mr. John Amphlett, whose estates adjoined the common, for a declaration that certain strips of land wrongfully enclosed by the defendant formed part of the common, and for consequential relief. The defendant died since the presentation of the appeal to the House, and his executor was the present respondent.

The common was regulated by commissioners under the Regulation (Clent) Provisional Order Confirmation Act, 1880, and an award made in April, 1881.

The physical and visible boundary separating the common from the defendant's land was an ancient hedge. There were no ditches on the common side of the hedge, nor was there any indication that such ditches ever existed.

The plaintiff contended that the boundary line should be drawn along the outer line of "growers," i.e., the trunks or stems of the bushes and trees which formed the hedge, as shown by the award map.

The defendant contended that the universal rule and practice on this common was to allow a ditch width of about

* *Present*: VISCOUNT FINLAY, VISCOUNT CAVE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

(1) [1918] Ch. 232.

H. L. (E.) four feet to the owner of an enclosure abutting on the common
1920 in order to protect his hedge, and that this rule applied,
COLLIS although at the present time there was no ditch or trace of
v. a ditch.
AMPHLETT.

Younger J. held that the award map was conclusive as to the limits and extent of the common, and that the defendant was not entitled to a ditch width on the common side of the line of growers.

The Court of Appeal by a majority (Swinfen Eady and Warrington L.JJ., Scrutton L.J. dissenting) held that the award map was not conclusive against the defendant, inasmuch as the valuer had no jurisdiction to determine boundaries, and, on the evidence, that the proper inference of fact was that the legal boundaries of the old enclosures surrounding the common were about four feet outside the outer line of growers.

Upon the appeal to this House the appellant did not contend that the award map was conclusive, and the House expressed no opinion on this point.

The appeal does not call for a detailed report. In the opinion of the House it raised no question of general importance in point of law, but turned entirely on the facts as to the position of the line of growers in the particular case; in the words of Lord Sumner, the case was "really one of evidence, neither complex nor novel."

1919. July 24, 25, 28, 31. *C. J. Mathew K.C.* and *C. A. Bennett* for the appellant; *Hawke K.C.* and *H. H. Joy* for the respondent.

The House took time for consideration.

Their Lordships were of opinion that the plaintiff had proved his case, and that there was not sufficient evidence to establish the existence of the local custom asserted by the defendant. They came to the conclusion upon the evidence that the boundary of the common must be taken to be a line drawn along the growers of the hedge on their side next to the common and that neither the defendant nor

his successor could claim the right to erect or maintain a fence outside that line. It followed that the appeal should be allowed and the order of Younger J. should be restored.

H. L. (E.)

1920

COLLIS

v.

AMPHLETT.

Order of the Court of Appeal reversed and order of Younger J. restored. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House.

Lords' Journals, Dec. 11, 1919.

Solicitor for the appellant: *P. F. Walker, for J. Neild Collis, Stourbridge.*

Solicitors for the respondent: *Geare & Sons, for Marcy, Hemingway & Sons, Bewdley.*

[HOUSE OF LORDS.]

PORT OF LONDON AUTHORITY . . .	APPELLANTS ;	H. L. (E.)*
AND		1920
ASSESSMENT COMMITTEE OF ORSETT } UNION AND OTHERS }	RESPONDENTS.	Jan. 30.

Rating—Docks—Statutory Authority—Restrictions on the Application of Profits—Annual Value—Hypothetical Tenant—Deduction in respect of Tenant's Profits—Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1—Port of London Act, 1908 (8 Edw. 7, c. 68), s. 21.

The Port of London Authority was a body corporate established by the Port of London Act, 1908, for the purpose of administering, preserving and improving the port of London. By the Act the undertakings of certain existing dock companies were transferred to this body in exchange for the issue of various classes of Port stock, and it had the same powers of taking dues from vessels using the docks as the outgoing companies. The Act also provided for the application of the receipts of the Port Authority in payment of (a) working expenses, (b) interest on the various classes of Port stock and on any other loans raised by the Port Authority, (c) all sums required by the Act to be paid (i.) into a sinking or redemption fund, (ii.) into a reserve fund created by the Act; and it directed that the ultimate balance should be applicable for the benefit of the port as the Port Authority might determine. Upon

Present : LORD BIRKENHEAD L.C., VISCOUNT HALDANE, LORD DUNEDIN, and LORD BUCKMASTER.

H. L. (E.)
 1920
 PORT OF
 LONDON
 AUTHORITY
 v.
 ASSESSMENT
 COMMITTEE
 OF
 ORSETT
 UNION.
 —

an appeal against a rate made upon the Port Authority in respect of a hereditament which formed part of the undertaking of one of the outgoing companies, quarter sessions, in fixing the rateable value of the hereditament on the basis of the rent which a hypothetical tenant might be reasonably expected to pay for it, made no allowance for tenant's profits beyond allowing interest on the capital employed, conceiving that they were precluded by law from so doing by *Mersey Docks and Harbour Board v. Liverpool Overseers* (1873) L. R. 9 Q. B. 84 :—

Held, that quarter sessions were not precluded by law from making an allowance for tenant's profits.

Mersey Docks and Harbour Board v. Liverpool Overseers, if and so far as it decides the contrary, overruled.

Per Viscount Haldane: *Mersey Docks and Harbour Board v. Liverpool Overseers* is distinguishable by reason of the difference between the provisions of the Mersey Docks Acts and the provisions of the Port of London Act, 1908.

Decision of the Court of Appeal [1919] 2 K. B. 1 reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of the Divisional Court upon a case stated by the Essex quarter sessions on an appeal against a poor rate made by the respondents upon the appellants, the Port of London Authority.

The rate under appeal related to a portion of the Tilbury Docks which prior to the passing of the Port of London Act, 1908, formed part of the undertaking of the London and India Docks Company. That undertaking, together with the undertakings of certain other dock companies, was transferred by the Act to the appellants.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the judgment of Viscount Haldane.

The quarter sessions, in estimating the rent which a hypothetical tenant might be reasonably expected to give for the premises, acting on the authority of *Mersey Docks and Harbour Board v. Liverpool Overseers* (2), made no allowance for tenant's profits beyond allowing interest on the capital employed.

The question for the opinion of the Court was "Whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenant's profits."

(1) [1919] 2 K. B. 1.

(2) L. R. 9 Q. B. 84.

The Divisional Court (Darling, Coleridge and Avory JJ.) H. L. (E.) answered this question in the affirmative.

The Court of Appeal (Bankes, Warrington and Duke L.JJ.) answered the question in the negative, but, conceiving that the appellants were claiming the deductions as a matter of right, and regarding the question as a question of fact for the rating authority, they dismissed the appeal.

1920

PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.

Nov. 20, 21, 24. *G. J. Talbot K.C.* and *Ryde K.C.* (with them *E. M. Konstam K.C.*) for the appellants. Under s. 1 of the Parochial Assessments Act, 1836, the test of the net annual value of a hereditament for rating purposes is the rent at which the same might reasonably be expected to let from year to year, and it has been held that this test may be applied to a case like the present in which an actual tenancy is impossible. The question is whether quarter sessions, in considering what rent a hypothetical tenant would be willing to pay for the docks in question in this case, are bound in law to find that he would give a rent which would leave him nothing for his own purposes, if he were a private individual or a trading company, or, if he were a public body the application of whose income is regulated by statute, would leave nothing for the purposes to which the statute obliges him to apply it; or whether they are free, if they please, to find that he would pay such rent only as would leave over something for those purposes. It is submitted that there is no rule of law which prevents the rating authority from making a deduction in respect of tenant's profits if they think proper to do so. The Port Authority is to be treated for this purpose on the same footing as an ordinary trader. It is only true to say that the authority cannot make a profit if "profit" is used as meaning something which a man may put into his own pocket; it is as much entitled to make a profit as anybody else, and the allocation of the profits when made is irrelevant to the question in hand. By the Port of London Act, 1908, the undertakings of certain pre-existing dock companies are transferred to the Port Authority in exchange for Port stock, and the docks in question in this

H. L. (E.) appeal formed part of one of those undertakings. The statute substitutes the Port Authority for the outgoing dock companies and puts it in as nearly the same position as possible. It cannot be contended that the earning capacity of these hereditaments has been increased by reason of their transfer from a private company to a public body or that such transfer affords a ground for an increase in their rateable value by the exclusion of an allowance for tenant's profits, which would have been admissible if they had remained the property of the dock company. Sect. 21, which prescribes the mode in which the profits of the Port Authority are to be applied, is no bar to the appellants' claim to have a proper deduction made for tenant's profits, for the section in no way limits the profits to be made, but appropriates the profits when earned to particular purposes. Either the premises must be rated in the way contended for by the appellants or they have no rateable value at all. Quarter sessions conceived that they were precluded as matter of law by *Mersey Docks and Harbour Board v. Liverpool Overseers* (1) from giving effect to the appellants' contentions of fact. The Court of Appeal have held that there is no such rule of law as supposed, but have nevertheless affirmed the decisions of the Courts below. The judgments of the Lords Justices are on the face of them self-contradictory, and cannot be supported. If quarter sessions were not precluded by law from considering whether a deduction should be made for tenant's profits there is no answer to the appellants' contention on the facts. Blackburn J.'s decision in the *Mersey Docks Case* (1), so far as it lays down a rule of law that, in rating a public authority which is restricted by statute in the mode of application of its profits, no deduction can be made in respect of tenant's profits, is wrong, and ought to be overruled. It appears to be based upon some confusion of thought as to the true meaning of the word "profits" and fails to distinguish between a restriction upon the earning of profits and a restriction upon the application of the profits when earned. It is moreover inconsistent with the view expressed

(1) L. R. 9 Q. B. 84.

by the same learned judge delivering the opinion of the majority of the judges in advising the House of Lords in *Mersey Docks and Harbour Board Trustees v. Cameron and Jones v. Mersey Docks and Harbour Board Trustees*. (1) These observations are directly in point. The decision in the later case may, however, be supported if confined to the special provisions of the Mersey Docks Acts, which differed materially from the provisions of the Port of London Act, but it has then no application to the present case.

Sculcoates Union v. Dock Co. at Kingston-upon-Hull (2), upon which the respondents rely, has no bearing on this case because the House was there dealing with restrictions on the profit-earning capacity of the undertaking. Here the restriction is upon the application of the profits only. It is said, however, that the principle of the *Mersey Docks Case* (1) has been followed in three cases in Scotland. Of those cases the first, *Dundee Gas Commissioners* (3), was a case of a statutory restriction upon the earning of profits, not upon their application; the second, *Kirkwall Harbour Trustees* (4), is of no value as an authority because no reasons are given in the report; the third, *Ayr Harbour Trustees v. Assessor for Ayr* (5), is a decision on the lines of the *Mersey Docks Case* (6), and is open to the same criticism.

[They also referred to *Dewsbury and Heckmondwike Waterworks Board v. Penistone Union Assessment Committee* (7); *Davies v. Seisdon Union* (8); *West Kent Main Sewerage Board v. Dartford Union Assessment Committee* (9); *Dean and Chapter of St. Asaph v. Llanrhaidr-yn-Mochnant Overseers* (10).]

Colefax K.C. and *Hawke K.C.* (with them *Jeeves*) for the respondents. *Mersey Docks and Harbour Board v. Liverpool Overseers* (6) is good law and good sense and is applicable to this case. The question is whether the 10 per cent. on the gross receipts, which is ordinarily taken as representing

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.

- | | |
|-----------------------------------|-----------------------------|
| (1) (1865) 11 H. L. C. 443, 479. | (6) L. R. 9 Q. B. 84. |
| (2) [1895] A. C. 136, 148; [1894] | (7) (1885) 16 Q. B. D. 585; |
| 2 Q. B. 69, 81. | (1886) 17 Q. B. D. 384. |
| (3) (1881) 9 R. 1240. | (8) [1908] A. C. 315. |
| (4) (1881) 9 R. 1243. | (9) [1911] A. C. 171. |
| (5) (1894) 21 R. 807. | (10) [1897] 1 Q. B. 511. |

H. L. (E.) 1920
 PORT OF LONDON AUTHORITY
 v.
 ASSESSMENT COMMITTEE OF ORSETT UNION.

tenant's profits, ought to be deducted. If this deduction is allowed that is in truth to deduct from the receipts something which is not there. The hypothetical tenant cannot be regarded otherwise than as subject to all the provisions of the statute. These particular premises have to be used under the provisions of the Act in a particular way. The Port Authority cannot divest itself of these premises, and it is impossible to conceive the undertaking being carried on apart from the provisions of the Act. It is not denied that the Port Authority makes profits but it must appropriate them in a particular way. The commercial tenant cannot be considered as a hypothetical tenant in ascertaining the value of this hereditament or other hereditaments subject to similar statutory restrictions. Having regard to the restrictions imposed upon this undertaking, this hereditament cannot be treated as capable of being occupied on the ordinary commercial basis: it must be taken as it is with all its advantages and with all its fetters and disabilities. This undertaking is not carried on on the basis that there is a surplus of receipts over expenditure which the trader would be entitled to dispose of as he pleases. The respondents do not rely on the reasoning of the Court of Appeal. Their judgments proceeded on the basis that the appellants were claiming as of right to make the deduction. They thought the appellants were wrong in that, but they thought the respondents were also wrong in claiming that quarter sessions were precluded by law from making the deduction. But, though they answered that question in the negative, their reasoning leads to an answer in the affirmative. In *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (1) Lord Halsbury states the principle upon which rating authorities are to act. Broadly put the question to be determined is a question of fact, but in dealing with that question the authority may wrongly include or exclude something, and that is a question of law. That principle was misapplied by the Court of Appeal. Where a statutory body owns an undertaking which must be conducted according

(1) [1901] A. C. 175, 179.

to the provisions of the statute the owner may be treated as a hypothetical tenant, and if it is shown that that particular tenant would pay a larger rent for the property than any other tenant the commercial tenant is excluded: *London County Council v. Erith Overseers* (1), approving *Reg. v. School Board for London* (2) and overruling *Owens College v. Chorlton-upon-Medlock Overseers*. (3) The *Erith Case* and the *Sculcoates Case* (4) proceed upon the same principle as *Mersey Docks and Harbour Board v. Liverpool Overseers*. (5)

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.

G. J. Talbot K.C. in reply. According to the respondents' argument, whenever a commercial undertaking is transferred to a statutory body the rateable value ipso facto goes up. Precisely the same argument was put by the appellants in *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee* (6), and was dealt with by Lord Davey, who said that the observations of Blackburn J. in advising the House in *Jones v. Mersey Docks and Harbour Board Trustees* (7) afforded a complete answer to it.

The House took time for consideration.

1920. Jan. 30. LORD BIRKENHEAD L.C. My Lords, this is an appeal from an order of the Court of Appeal dated February 24, 1919, affirming an order of a Divisional Court of the King's Bench Division dated November 13, 1918.

The question now before this House arose in the course of a rating appeal to the Essex quarter sessions brought by the present appellants in respect of that part of their undertaking which is known as Tilbury Docks. The appellants are a public body incorporated by the Port of London Act, 1908, and the docks are vested in them on the conditions laid down by that Act, which is a public general Act.

On December 5, 1917, the Essex quarter sessions made an order embodying their decision, and their findings are set out in paragraph 20 of the case which they subsequently

(1) [1893] A. C. 562, 591, 593-595.

(4) [1895] A. C. 136.

(2) (1886) 17 Q. B. D. 738.

(5) L. R. 9 Q. B. 84.

(3) (1887) 18 Q. B. D. 403.

(6) [1901] A. C. 175, 184.

(7) 11 H. L. C. 443.

H. L. (E.) stated for the opinion of the High Court, and which is to be found in the appendix, pp. 8, 9: "The quarter sessions in giving judgment on the said appeal fixed the gross estimated rental of the Port Authority's undertaking in the parish of Chadwell St. Mary at 106,863*l.* and the rateable value thereof as 52,063*l.*; and stated that in arriving at this decision the Court had acted upon the decision in *Mersey Docks v. Liverpool Overseers* (1), and it had in consequence made no allowance for tenant's profits beyond allowing interest on the capital employed;" The case raised two questions, only one of which is material—namely, "(1.) Whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenant's profits." They proceeded: "If the Court answers . . . in the affirmative the decision of the quarter sessions is to stand, otherwise the case is to be remitted to them to determine the gross and the rateable values respectively in the light of and in accordance with the decision of the Court."

The Divisional Court, conceiving itself equally bound by the decision of the Court of Queen's Bench referred to, affirmed the decision of quarter sessions. The Court of Appeal came to the conclusion that the question should be answered in the negative but did not remit the case to quarter sessions. The view of the Court of Appeal was that in substance the respondents had succeeded and they therefore dismissed the appeal, which comes before your Lordships in the unfortunate position that neither of the parties supports the form of the order made by the Court of Appeal.

The difficulty in this, as in so many other cases, arises from the terms of the Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1: "No rate for the relief of the poor in England and Wales shall . . . be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent charge, if any, and

(1) L. R. 9 Q. B. 84.

deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. . . .”

Where a hereditament is let on such terms, the only task of the rating authority is to find out the actual rent, and in any case where the property is let, or is of the same character as other hereditaments which are let, the adjusting of the figures to arrive at the “net annual value” is a question of fact. There is however no such guide available with regard to hereditaments such as docks, and therefore it is necessary to have recourse to some factor other than the valuation of the market to determine what is the net annual value of the hereditaments to be rated.

Several methods are available for such cases, and it does not follow that the rating authority would necessarily be wrong if it adopted one method when dealing with one hereditament and another method when dealing with a different hereditament.

Subject to the exception which I mention later, the quarter sessions here adopted a very usual method—namely, to make a calculation based on the profit-earning capacity of the docks. By this reckoning the amount of the gross receipts is ascertained, and from such amount are deducted the expense of earning such receipts, the deductions provided for by statute, interest on tenant’s capital and the estimated amount of tenant’s profit. The figure so ascertained would give the rating authority a valuable indication as to the rent which the hypothetical tenant would be likely to give for the right to occupy the hereditament in question and therefore would enable them to form an opinion as to the correct amount of the “net annual value” for the purpose of rating.

If such a method were adopted, then, subject to the point at issue in this case, it could not be contended that quarter sessions were wrong in law, and indeed neither side has so contended. The dispute arises on the exception—namely, that in applying the method to this particular case quarter sessions excluded from their calculation any sum for tenant’s profit, and they did so because they conceived that they

H. L. (E.)

1920

PORT OF
LONDON
AUTHORITYv.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.Lord
Birkenhead
L.C.
—

H. L. (E.) were bound in law by the authority of *Mersey Docks v. Liverpool Overseers*. (1)

PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.

Lord
Birkenhead
L.C.

If, therefore, quarter sessions were wrong, they were wrong on a point of law and not on a question of fact, and their finding is open to review and correction.

Now if these docks had remained in the hands of the former owners, not only could this exception not have been made in applying the method, but it could not have been contended that it ought to have been made. We are therefore asked to lay down as a rule of law that where hereditaments such as docks are owned and occupied by a public authority which is bound by law not to make profits in the same way as a commercial concern does, or even as a local authority by municipal trading may do, then the rating authority must assume that the hypothetical tenant does not intend or desire to make any profit. It would necessarily follow, therefore, that the transfer of these docks to the appellants of itself increased their annual value, and consequently their rateable value, without any other change being made. At one time it was thought that in such a case the exact opposite result followed—namely, that the docks would cease to be rateable at all—but since the decision of this House in the case of *Mersey Docks and Harbour Board Trustees v. Cameron* (2) all such hereditaments have been held to be rateable. As Blackburn J. said in the course of the opinion given by him on behalf of the majority of the judges consulted (3): “The company, by virtue of its occupation, receives the rates on shipping using the docks, and the amount thus received is applicable to keeping up the docks, and then to paying interest on the loans, the amount of which is limited, and then in paying dividends on the share capital; and it is common to have a maximum limit put on the rate of the dividend; when that maximum dividend is reached, the rates must be lowered. It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now if, without in any way altering the mode in which the docks are enjoyed

(1) L. R. 9 Q. B. 84.

(2) 11 H. L. C. 443.

(3) 11 H. L. C. 479.

by the public, or altering the rates leviable, or changing the harbour masters and others who manage it, we change the name of the body which occupied it from that of 'the Company' to that of 'the Board'; and if, instead of 'the Company' paying to the shareholders a maximum dividend on their capital, the 'Board' must pay to the same individuals the same identical sums, but call them 'interest on bonds' instead of 'maximum dividend on share capital,' what difference does this make?"

For these and for other reasons set out in his opinion Lord Blackburn reached the view, accepted by the House of Lords, that the Mersey Docks were rateable.

Subsequently the question of tenant's profits was considered by the Court of Queen's Bench in the *Mersey Docks Case* (1) already cited. Blackburn J. was a member of the Court, and delivered the judgment upon which quarter sessions acted in the present case. The provisions of the Acts which regulate the undertaking of the Mersey Docks and Harbour Board are materially different from the corresponding provisions of the Port of London Act, and it might be possible, on a detailed examination of those provisions, to discover reasons which would justify a distinction being drawn between the Mersey Docks and the appellants' undertaking, and even a difference in the rateability of those undertakings. I prefer, however, to base my judgment upon other and broader considerations, and therefore do not pause to deal with these differences at length. The decision of the Court of Queen's Bench was that, on the true construction of the statutes applicable, no hypothetical tenant could lawfully derive any pecuniary benefit from his occupation and therefore that no allowance should be made for tenant's profit. Blackburn J. said (2): "If the premises were let to a tenant, it must be a tenant subject to this Act" (i.e., to the Mersey Dock Act of 1858), "bound to hand over the rates received, after deducting the expenses and charges of collecting the rates . . . and the persons paying the dock rates would have a right to object to any part of them being applied

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
Lord
Birkenhead
L.C.

(1) L. R. 9 Q. B. 84.

(2) Ibid. 97.

H. L. (E.) 1920
 PORT OF LONDON AUTHORITY
 v.
 ASSESSMENT COMMITTEE OF ORSETT UNION.
 Lord Birkenhead L.C.

to pay tenant's profits. . . . In such a case as the present, where an actual demise on any terms would be impracticable, and where a demise on the terms that the tenant should receive a profit beyond the expenses of collection, would, if practicable, be illegal, we think no deduction should be made on account of tenant's profits."

This decision has been mentioned in a number of cases in this House, but that part which is now under discussion has never been expressly affirmed or overruled.

Before considering this judgment of Blackburn J. I think it desirable to restate certain propositions of law which must at the present day be regarded as established.

Firstly, the question of rateability does not depend on whether the occupier does, or can, make a profit by the use to which he puts the hereditament; it depends on whether the occupation is of value. Secondly, in considering what rent a tenant would pay, the rating authority must consider the owner who is in actual occupation, or indeed the only possible occupier, as a possible tenant. Thirdly, in cases such as the present where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, such as docks, the profits earned, and the share of profits attributable to any particular hereditament, have to be taken into account. Fourthly, in such cases, any restriction imposed by law on the profit-earning capacity of the undertaking must be considered, for the profits to be taken into account must be such as the tenant can earn under the only conditions in which he is allowed to earn profits at all.

In other words, if the law has prevented the hereditament being profitable at all, then the occupation is of no value, and if the law has restricted its profit-earning capacity, then the effect of such restriction will tend to diminish the value. This proposition does not mean, and ought not to be understood to mean, that, where profits can lawfully be earned, but such profits must be applied in a particular way or for a particular purpose, the occupation of the hereditament is valueless and therefore not rateable, or, on the other hand, that the tenant derives no profit from the occupation, and

therefore that the whole profit increases the net annual value of the land. With the greatest respect for Lord Blackburn, I must make plain my view that in the second case he had not in his mind the full bearing of the principle which he enunciated in the earlier case. It will be seen that by s. 284 of the Mersey Docks Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), surplus profits were to be applied in extinguishing loans and other charges, and, on their extinction, the profits were to be applied in reducing the dock rates; and by s. 4 of the 1859 Act (22 Vict. c. xx.) the Board was empowered to create a sinking fund. It is easy to conceive that the Inland Revenue would rightly claim, for purposes of income tax, that the hypothetical tenant made profits, and that provisions such as those I have cited do not limit the profit-earning capacity so much as prescribe rules for the application of profits when earned. The same observation applies with even greater force to many of the rules prescribed by s. 21 of the Port of London Act, 1908, as binding upon the appellants. I am therefore constrained, reluctant as I am to question the very great authority of any opinion of Lord Blackburn, to hold that, in the judgment which I am now considering, he omitted to observe the distinction between restrictions upon profit-earning capacity and rules providing for the application of profit when earned, and that so far as he did so omit, his judgment cannot be upheld. In so holding, I do not mean that his judgment was wholly wrong; there are provisions in the Mersey Acts, and also in the Port of London Act, which have, or may have, the effect of limiting the profit-earning capacity of the docks respectively in question. So far as there are such provisions they come within the fourth of the propositions to which I have referred, and must be taken into account by the rating authority in fixing the rateable value of such hereditaments. In my opinion the *Mersey Docks Case* (1) did not preclude the quarter sessions from entering upon an inquiry as to the amount of tenant's profits that a hypothetical tenant would expect to make, or, if it did, it was wrongly decided, and the

(1) L. R. 9 Q. B. 84.

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
—
Lord
Birkenhead
L.C.
—

H. L. (E.) question put by the quarter sessions must therefore be
 1920 answered in the negative. In the result the case must be
 PORT OF remitted to them for further consideration. This appeal
 LONDON must therefore, in my view, be allowed, the respondents
 AUTHORITY v. paying to the appellants their costs here and below, and
 ASSESSMENT COMMITTEE OF I move your Lordships accordingly.

ORSETT
 UNION.
 Lord
 Birkenhead
 L.C.

VISCOUNT HALDANE. My Lords, under its Act of 1908 the Port of London Authority was incorporated for the administration and improvement of that port. The scheme of the Act was that the new authority should carry on the undertakings to be transferred to it from the then existing dock companies, as well as acquire other undertakings of an ancillary character, and should possess powers of new construction and of management, as well as certain other powers. The undertakings of the existing dock companies (including that of the London and India Docks Company) were ultimately transferred, under the powers conferred by the Act, to the new authority in consideration of the issue to these companies of stock of the new authority. In every case the new authority had the same power to carry on the undertakings transferred to it, and, in the main, to charge limited rates and dues which the company, the undertaking of which was so transferred, possessed in respect of vessels entering or leaving its dock.

The receipts of the Authority were, under s. 21, to be applied in payment, firstly, of the expenses of working and maintenance; secondly and thirdly, of interest on the various classes of stock thus issued; fourthly, of interest on loans raised otherwise than by the issue of Port stock; fifthly, of moneys required for a sinking fund or for redemption of capital liability; sixthly, for payment into a reserve fund prescribed by the Act; and, finally, for such purposes and in such manner for the benefit of the Port as the Authority should determine.

My Lords, the old dock companies carried on business in order to make profits, and the scheme of the Act of 1908 appears to have been to give their stockholders a surrogatum,

in the shape of a new stock which was to take the place of the existing stock, and to return fixed rates of interest in substitution for the shares of profits taken as dividends on their stock by the old stockholders. It is, therefore, to my mind plain that the new Port Authority was in this sense made by the Act a concern which had to carry on a profit-earning business, at all events so far as was required in order to earn profits out of which to pay this so-called interest. The new Authority was limited, like the old dock companies, as to the amounts it could charge for dues, but it was permitted to retain any surplus left after defraying these and the other charges imposed on its revenues under s. 21, and to apply that surplus as it thought proper for the purposes and for the benefit of the port. Under Part V. (5.) of the schedule to the Act the appropriate portion of the revenue paid over to a dock company by the Authority is to be applied, after discharge of any liabilities of the company which continue under the provisions of the Act, by being distributed among the various stockholders of the company as if it were profits available for distribution as dividend.

The question which has now arisen relates to the principle on which certain hereditaments at Tilbury which formed a part of the transferred undertakings of the London and India Docks Company should be rated by the respondents, who are rating authorities. The controversy is as to whether the appellants, the Port Authority, are entitled to claim an allowance for tenant's profits from the respondents arriving at the rateable value of these hereditaments. The statute which governs the power to rate, the Parochial Assessments Act of 1836, prescribes that the basis is to be an estimate of the net annual value of the hereditaments, defined as the rent at which the same might reasonably be expected to be let from year to year, free of all usual tenant's rates and taxes, and tithe-commutation rent charge, after deducting the probable average annual cost of repairs, insurance and other expenses necessary to maintain them in a state to command such rent.

I will now for convenience state what I think are the

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
Viscount
Haldane.

H. L. (E.) fundamental principles ascertained as regulative of the rights of rating authorities after a good deal of judicial controversy.

1920
PORT OF LONDON AUTHORITY
v.
ASSESSMENT COMMITTEE OF ORSETT UNION.
Viscount Haldane.

It is settled that in estimating the amount of rent for which the premises may, for rating purposes, be expected to let, there is to be excluded from that amount the share of the profit from their occupation which the tenant would require for himself as an inducement to become tenant. It is also settled that the premises are not the less rateable merely because the owner is in occupation, and is capable in law and in fact neither of himself letting nor of becoming a tenant. He is none the less on that account to be taken as a "hypothetical tenant" for the purpose of arriving at the annual value. For the premises may have a value for him due to their special suitability for his purpose, and it may be estimated that he would be willing to give more rent for them for this reason than anyone else would give. Again, it has been laid down that the true test is not whether pecuniary profit can be made out of the occupation, but what is its value to the person concerned measured, I think, simply by what he would be willing to give in order to obtain it.

It has further been made clear by the decision of this House in 1864 in the case of *Jones v. Mersey Docks and Harbour Board Trustees* (1) that while property held by the Crown, or by persons occupying it exclusively for the service of the Crown, is not rateable under any statute in which the Crown is not expressly named, the mere fact that the property is in the hands of trustees who occupy it for the maintenance of works declared to be beneficial to the public, and have to apply the profits exclusively for the maintenance of their undertaking, and not for their own benefit, does not exempt it from rateability. If, however, the Legislature has prohibited them from making any profit at all, or any profits exceeding a specified amount, then their premises cannot be rated on any hypothesis as to possible profits inconsistent with this prohibition. The occupation is in such a case said to be "sterilised" in relation to any conceivable amount beyond the limit of the prohibition. That was explained in

(1) 11 H. L. C. 443.

the decision of this House in *Sculcoates Union v. Dock Co. at Kingston-upon-Hull* (1), which made it clear that this qualification may have to be made when considering the application to hypothetical tenancy of the general principles to which I have referred in the first place, and which were laid down in the judgment of Lord Herschell L.C. in *London County Council v. Erith Overseers*. (2)

My Lords, in the case now under consideration the appellants, the Port of London Authority, were rated by the respondents for poor rate on the basis that 119,240*l.* was their gross estimated rental for the hereditaments in question, and that 64,440*l.* was the rateable value. The appellants appealed to the quarter sessions for the county of Essex, and that body reduced the gross rental value to 106,863*l.* and the rateable value to 52,063*l.* But they stated a special case with questions, of which the only one we have to consider is the first—whether they were right in holding that they were precluded by law from making any allowance for tenant's profits in arriving at the rateable value of the hereditaments. They made no such allowance beyond one of interest on tenant's capital, considering that they were precluded from doing so by the decision of the Court of Queen's Bench in *Mersey Docks and Harbour Board v. Liverpool Overseers*. (3) The King's Bench Division held on this special case that they were bound by that decision, and gave formal judgment, upholding the view of quarter sessions. The Court of Appeal were of opinion that the first question raised by the special case could not be answered in the affirmative, on the ground that the refusal of an allowance for the tenant's profits depends upon questions of fact to be determined by the rating authority, but they thought that quarter sessions were right in their view that no general allowance for tenant's profit could legally be made in the case under consideration. In effect the Court of Appeal dismissed the appeal. What we have now to decide is whether the view so taken was correct, or whether the case should be remitted to the King's Bench

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
—
Viscount
Haldane.

(1) [1895] A. C. 136.

(2) [1893] A. C. 562.

(3) L. R. 9 Q. B. 84.

H. L. (E.) Division to have the first question answered in accordance with a different view from that of the Court of Appeal.

1920
 PORT OF
 LONDON
 AUTHORITY
 v.
 ASSESSMENT
 COMMITTEE
 OF
 ORSETT
 UNION.
 ———
 Viscount
 Haldane.

My Lords, in the Courts below the opinion appears to have prevailed that the case of the appellants was covered by the decision in *Mersey Docks v. Liverpool Overseers*. (1) If it were clear that it was so covered I should feel reluctantly bound to review what was laid down by a decision of such authority. But I am by no means sure that the provisions of the statute of 1867, which defined the position of the Mersey Docks and Harbour Board, and was construed by the Court of Queen's Bench in that case in the view taken of them in that case, presents a true analogy to those provisions of the Port of London Act of 1908 with which we are concerned here. In the instance of the Mersey Docks an early statute passed in the reign of George III. had vested the docks and works on the Liverpool side of the river in the corporation of Liverpool, as trustees of the Liverpool Docks, on trust out of the amount of the rates they were empowered to levy when all charges and mortgages on the rates had been paid off and provision had been made for cost of management and collection of rates and improvements, repair and maintenance of the docks and works vested in the trustees to lower and reduce the rates and duties which the statute had empowered the trustees to levy. Other docks having been formed on the Cheshire side at Birkenhead, these also were vested, by an Act of 18 & 19 Vict., in the Corporation of Liverpool. By a subsequent Act of 1867 the whole of the docks and property vested in these trustees of the Liverpool Docks was transferred to the Mersey Docks and Harbour Board, to form one estate under a uniform system of management. By s. 56 of this Act it was provided that no moneys receivable by the Board should be applied to any purpose except such as conduced to facilitating shipping. There were no shareholders of the Corporation, and no members of the Board or other person could derive any personal advantage from the trust. Provision for payment of interest on money borrowed for construction, and provision for the application of any

(1) L. R. 9 Q. B. 84.

surplus income, were made by the Mersey Docks Consolidation Act of 1858, which prescribed that, after paying the interest on money borrowed, and after providing for the construction of authorized works and for their maintenance and for management, preservation and improvement of the Mersey Docks Estate, the surplus of the moneys received by the Board should be applied in repayment of the principal of the sums borrowed or owing, and the extinguishing of certain annuities, and when this had been accomplished then in reduction of the rates authorized to be taken, and not for any other purpose.

The Board claimed an allowance in estimating the rateable value of their property for tenant's profits. The Court of Queen's Bench decided that they were not entitled to this. Blackburn J., in delivering the judgment of the Court on the question, pointed out that the revenue that was permitted to be raised was completely appropriated to payment of expenses and charges and other specified purposes of the same kind. If the premises were let it could only be to a tenant bound under the statute to apply what he received after defraying expenses of collection to these purposes, and nothing could be made available for tenant's profits, for these were in effect declared to be illegal.

My Lords, I think that the substance of this judgment was that, in the view of the Court, the Mersey Docks, if treated as in the hands of a hypothetical tenant, must be treated as in that case sterilized in his hands so far as possible profit to himself was concerned. The scheme of the Acts to which I have referred bears this out. For even if the docks were improved out of revenue, any pecuniary fruit due to the improvement had to go in reduction of rates and dues. There were no share or stock holders who were to receive part of the revenue earned as an equivalent of their profits from a transferred undertaking, and there was no way in which the docks could be made to have a greater pecuniary annual value for the trustees as distinguished from the ship-owning public.

This appears to me to have been the character of the scheme of legislation there, and in the absence of a detailed

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
Viscount
Haldane.

H. L. (E.)

1920

PORT OF
LONDON
AUTHORITYv.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.Viscount
Haldane.

examination and argument on the details of its provisions
I do not find myself in a position to pronounce that the Court
of Queen's Bench took a wrong view of them.

My Lords, the scheme established by the Port of London
Act is materially different from what that scheme was taken
to be. In so far as the appellants can increase their revenue
(and this is permitted to them within limits prescribed for
dues and rates), the surplus so obtained is to go for the benefit
of the Port in such form as they choose. They may increase
the annual value of the property by investing the surplus
in this fashion. It therefore appears to me that their position
is quite different from that attributed to the trustees of the
Mersey Docks. For the latter could neither accumulate and
invest surplus revenue nor had they stockholders who received
interest from them with the character of profit. In the view
which I take, the case of *Mersey Docks v. Liverpool Overseers* (1)
does not preclude me from coming to the conclusion that the
appellants may be entitled to an allowance for tenant's profit.
That case was not inconsistent with the previous decision of
this House in *Jones v. Mersey Docks and Harbour Board Trus-*
tees (2) in 1864. There all that was held was that the mere
circumstance that the trustees derived no benefit from their
occupation, inasmuch as the surplus was earmarked for the
benefit of the public in the form of reduction of rates and
dues, did not exempt the docks from liability to be rated.
The question of an allowance for tenant's profits did not
arise, and it was not dealt with until *Mersey Docks v. Liver-*
pool Overseers (1) was subsequently decided in 1873.

In the case before us I think that the appellants may, on
principles which are now well settled, be entitled to such an
allowance. I am therefore of opinion that the Court of Appeal
were wrong in coming to a different conclusion, and that
the case should be remitted to the King's Bench Division
to answer the first question raised by the special case in the
negative as held by the Courts below, but with the very
important declaration added, that the provisions of the Port
of London Act of 1908 do not in law preclude the appellants

(1) L. R. 9 Q. B. 84.

(2) 11 H. L. C. 443.

from making a claim to an allowance for tenant's profits going beyond interest on capital employed, if on the facts they can establish such a claim.

LORD DUNEDIN. My Lords, Lord Halsbury in the case of the *Mersey Docks v. Birkenhead Assessment Committee* (1) pointed out that much of the difficulty in rating cases had arisen from the advisory character of the judgments pronounced by the various Courts of review, forgetting that the question to be determined was in its inception a question of fact for the assessing body, and that the province of the Courts lay only in correcting errors of law. I had occasion myself, in the subsequent case of the *Great Central Ry. Co. v. Banbury Union* (2), to point out that the dictum—simple in itself—became sometimes a hard saying when you had to follow it. No one doubts its soundness, yet what it comes to is this. The question of what an assessing body ought to do in a particular case cannot be laid down without trenching on a question of fact. But if an assessing body, having considered the case, bases its valuation on the view either that it must do or that it must not do a certain thing in arriving at that valuation, that is a question of law, and the Courts of review may say whether the assessing body was right or wrong. And it is not in every case easy to draw a sharp line which relegates to its own compartment each of these three propositions. I regret to think that the judgment in this case of the Court of Appeal cannot stand as it is. It is not upheld either by the appellants, as is natural, who lose by it, or by the respondents, who win under it. This is not conclusive, though it engenders uncomfortable feelings. But it cannot stand, in my view, for two cogent reasons. In the first place it answers the first question in the negative, and if that is so settled the necessary corollary is to remit the case, whereas the order does no such thing, but affirms the finding of the quarter sessions. In the second place it grievously, I think, misinterprets the attitude and argument of the appellants. The learned Lord Justice who delivered

H. L. (E.)

1920

PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.

(1) [1901] A. C. 175, 179.

(2) [1909] A. C. 78.

H. L. (E.) 1920
 PORT OF LONDON
 AUTHORITY
 v.
 ASSESSMENT
 COMMITTEE
 OF
 ORSETT
 UNION.
 Lord Dunedin.

the leading judgment says : “ The appellants are contending that the Assessment Committee are as a matter of law bound to deduct a full tenant’s profits from the dock receipts before arriving at the rateable value.” That such an argument was raised before quarter sessions may be true, and the statements in the stated case suggest it. But it was not pleaded before your Lordships’ House, and when Mr. Talbot (whose arguments on all occasions that I have heard him, and they are not a few, have been conspicuously lucid) assures us that he used the same argument in the Court of Appeal as he has used before us, I confess I accept the statement.

I therefore address myself directly to the questions put in the special case. Now para. 20 states : “ The quarter sessions in giving judgment on the said appeal fixed the gross estimated rental of the Port Authority’s undertaking in the Parish of Chadwell St. Mary at 106,863*l.* and the rateable value thereof at 52,063*l.*; and stated that in arriving at this decision the Court had acted upon the decision in *Mersey Docks v. Liverpool Overseers* (1), and it had in consequence made no allowance for tenant’s profits beyond allowing interest on the capital employed. . . .” The natural sequence to that statement is Question (1.), which is as follows : “ (1.) Whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenant’s profits ? ”

Now, my Lords, that raises, in my humble judgment, the question sharply and decisively, was the judgment in the case of *Mersey Docks v. Liverpool Overseers* (1) right or wrong ? I confess I see no way of practical utility to distinguish that case from this. In any view that case has been treated in text-books, as it was treated by quarter sessions here, as laying down a general principle irrespective of the particular circumstances of the case. Now that was a decision only of the Queen’s Bench before the Judicature Act. It is, therefore, not a judgment of a Court of Appeal, such as a judgment in Exchequer Chamber would have been, and, in any case, is not binding on the House. On the other hand it is a judgment

(1) L. R. 9 Q. B. 84.

of a judge of very high authority, and it was pronounced more than forty years ago. But again there have been many judgments in this House on the general subject since then which touch, if they do not decide the question. What is the inquiry which the Commissioners and quarter sessions are engaged on? It is to find the net annual value of the hereditament in question. That is to say—and here I quote textually from the statute—"the rent at which the same might reasonably be expected to let from year to year"—subject to certain deductions which I need not recite; or, in other words, which have been often adopted when seeking to answer the question—what would the hypothetical tenant give for the subject? If the subject is an ordinary one similar in character to other subjects which have stood the test of the markets, or better still, if it has stood the test of the market itself without disturbing circumstances, the inquiry is simple. But when the nature and circumstances of the hereditament in question do not admit of such a test, some other way must be found. Now there are several ways of attacking the problem. One way is to consider what profit the hypothetical tenant could make out of the hereditament, not in order to rate that profit, but in order to find out what he was likely to give in order to have the opportunity of making that profit. Another way is to see what it would cost an owner to produce the hereditament in its present form and then to see what a tenant, who had not himself the money to be an owner, would give the owner yearly, it being assumed that that sum must bear some relation at ordinary rates of interest to what has been spent. No question of law is necessarily involved in either of these methods. Should an assessing authority so state its method of procedure, then, as Lord Halsbury said in *Mersey Docks v. Birkenhead Assessment Committee* (1), "What abstract proposition of law can be laid down to say that the Recorder" (who was the assessing authority in that case) "was wrong?"

Now the method of looking at the profits which are earned, in order to see what the hypothetical tenant would give, has

H. L. (E.)
 1920
 PORT OF
 LONDON
 AUTHORITY
 v.
 ASSESSMENT
 COMMITTEE
 OF
 ORSETT
 UNION.
 Lord Dunedin.

(1) [1901] A. C. 183.

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
Lord Dunedin.

been often employed when the ordinary market test was unavailable, and in particular it has often been employed in the case of docks. And assuming that these docks were in private hands no one has said that it would not be at once an ordinary and a proper mode of procedure to calculate thus: first, find the gross receipts as based on experience, then deduct the expenses of getting these receipts, the statutory reductions in the Poor Law Assessment Act, a sum for interest on tenant's capital, and a further sum to represent the tenant's profits; and this would be what might have been, and probably would have been done had the docks here remained with the former private owners. Now it would appear from the statements in the special case and the statements of parties that that is precisely the method which the quarter sessions adopted here, with this material exception, that they have made no deduction in respect of tenant's profits, because they thought they were precluded from doing so as a matter of law by reason of the decision in *Mersey Docks v. Liverpool Overseers*. (1) Accordingly they put the question directly—were they right in so thinking? The first observation that occurs is that it is a very curious result that, because a hereditament is transferred from private ownership to the ownership of a public authority, the old shareholders, no longer getting dividend but instead of that a fixed sum payable on stock issued by the Authority, the rateable value of the hereditament, which, so far as productiveness is concerned, remains unchanged, should suddenly be raised. This remark was made in this House in the case of *Jones v. Mersey Docks* (2) by Blackburn J. himself, reading the opinion of the majority of the consulted judges. It is true that there the question was whether there was rateability at all, but if appropriate to that there is no reason, so far as I can see, why it is not equally appropriate to the amount of rateability, which, after *Jones v. Mersey Docks* (3), *ex hypothesi* exists, though that was not settled at the date of the *Mersey Docks v. Liverpool Overseers*. (1)

(1) L. R. 9 Q. B. 84.

(2) 11 H. L. C. 479.

(3) 11 H. L. C. 443.

I now turn to the reasons given by Blackburn J. in the *Mersey Docks v. Liverpool Overseers* (1): "In the present case the value of the occupation depends entirely on the collection of the rates. Sect. 284 of the Mersey Docks Act, 1858, requires that all the rates shall be appropriated in payment of all expenses and charges of collecting the rates, and several other purposes therein specified. If the premises were let to a tenant, it must be to a tenant subject to this Act, bound to hand over the rates received, after deducting the expenses and charges of collecting the rates to those purposes; and the persons paying the dock rates would have a right to object to any part of them being applied to pay tenant's profits, except in so far as an allowance for that might be included in the expenses and charges of collecting the rates. But all the expenses and charges of collecting the rates actually incurred by the Mersey Dock Board, who are occupiers, are allowed for and deducted, and the contention for the Board is that we are bound, contrary to the fact, to suppose that the premises are let to an actual tenant, who would, contrary to the provisions of the Mersey Dock Act, levy in dock rates a sum, in addition to all the actual expenses of collection, for his own benefit"; and he then cites the case of a tithe rent charge and quotes a saying of Crompton J.: "It is difficult to see in such a case why a man might not take the tenancy on the same terms, or nearly so, as the collection."

Now it is a daring thing to accuse Lord Blackburn of confusion of thought, yet I suppose "*Quandoque bonus dormitat Homerus*" is as true of lawyers as of poets, and I cannot help feeling that there is a confusion here arising, as Mr. Talbot justly pointed out, from the varying sense of the word "profit." If you take the sum which an undertaking will bring in and deduct what it costs to run it, and find a balance, that is if you like to call it so a profit. I think the better words would be "earning capacity." But call it what you like—there it is. What becomes of it afterwards is another matter. This learned judge says that anyone who took the docks must

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
Lord Dunedin.

H. L. (E.) 1920
 PORT OF LONDON AUTHORITY
 v.
 ASSESSMENT COMMITTEE OF ORSETT UNION.
 Lord Dunedin.

take them under the Act of Parliament, and would be precluded from applying the money to pay tenant's profits. Here profits is being used in another sense. I am not quite satisfied even with the initial statement. Suppose the assessing body had calculated thus. If a private person had these docks without rating powers, and then said to the public "Come and use them and I will charge you so much if you come"—and there was every reason to suppose that the public would pay his charges—and then calculated on that assumption what the hypothetical tenant would offer as rent for the ability to do the same, I do not think that that assessing body would have transgressed any legal principle. But I agree that if in calculating receipts you take the produce of rates which can only be levied under the Act, then you must suppose the tenant to be under the Act. None the less if you wished to find out what would be actually offered, why should it be wrong to say he would not offer the whole amount of the return? It is here that Crompton J. in his judgment as to the rent charge seems to me to save himself by the words "or nearly so." If it were not for those words I would think that he was mixing up investment with tenancy. A man will pay such and such a capital sum to acquire a tithe rent charge, and the way he will get at it will be to say the tithe charge is so much, and to get it I have to pay the expenses of collection, and then I will calculate so many years' purchase or, what is the same thing, on the basis of a certain interest for my money, and arrive at what I will give. But whoever heard of a man giving 100*l.* a year to get 100*l.* a year? So that really the plan of calculating on the difference between receipts and expenditure breaks down unless you go on to consider what a tenant would probably, in the circumstances, give, or, if you so like to put it, what margin would he allow himself for contingencies. The same class of confusion is, I think, to be found in the application sought to be made by the respondents' counsel of the *London School Board* (1) and the *Sewer Cases*. (2) What the *London School Board Case* and the *Erith Case* really

(1) 17 Q. B. D. 738.

(2) [1893] A. C. 562.

settled was summarized by myself in the *Banbury Case* (1), where I said: "They seem to me to fix conclusively that rateable value is not destroyed either because (1.) there is no profit *de facto* derived from the land, or (2.) the occupants were disabled from making profits, or (3.) there is no one in the world, except the actual occupant, who, if the land as occupied were given up, would have any possible use for it."

But as to the matter now in hand, be it remembered that, in these cases, there was no possible inquiry open on the line of receipts and payments. I mean exhaustive inquiry, for I have not forgotten that in the last case on sewers in this House the sewers were partially a source of profit from payments made by others to allow their sewage to be put into them. I think the confusion was exposed and got rid of by Lord Herschell in the *Erith Case*. (2) He speaks of the expression "struck by sterility," and he says (2): "Now, if land is 'struck with sterility in any and everybody's hands,' whether by law or by its inherent condition, so that its occupation is, and would be, of no value to anyone, I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable." This seems to me to be the key of the whole matter. Sterility in earning profits is one thing, sterility in the disposing of profits is another. The former affects the value—the latter does not. The same thing is practically said by Lord Davey in *Mersey Docks v. Birkenhead Assesment Committee* (3): "I conceive that in principle, and impliedly (as I think has been held in subsequent cases which have come before the Courts), what was really decided was that, notwithstanding the restrictions upon the application of the profits resulting from carrying on that business on the hereditament, the profits so derived were a legitimate element in arriving at the value of the beneficial occupation

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
Lord Dunedin.

(1) [1909] A. C. 94.

(2) [1893] A. C. 591.

(3) [1901] A. C. 185, 186.

H. L. (E.) 1920
 PORT OF LONDON
 AUTHORITY
 v.
 ASSESSMENT
 COMMITTEE
 OF
 ORSETT
 UNION.
 Lord Dunedin.

which was to be the subject of rating." And then, after saying that he really derives this view from *Jones v. Mersey Docks* (1), he says: "In other words, it is perfectly immaterial what becomes of the amount which is the result of carrying on the business on the hereditament after paying the expenses and other outgoings." My Lords, all this seems to me directly contrary to what Blackburn J. said in the *Mersey Docks v. Liverpool Overseers*. (2) It is not for me to say what calculation the assessing body ought to make, but seeing the question they have to answer is, what would the hypothetical tenant give, I say unhesitatingly in my view there is no rule of law which prevents them performing the operation described as deducting tenant's profits. I am therefore of opinion that the question should be answered in the negative and the case remitted to quarter sessions.

LORD BUCKMASTER. My Lords, the Port of London Authority is a body corporate established by the Port of London Act, 1908, to administer, preserve and improve the Port of London. To effect this purpose the undertakings of certain existing dock companies were, by the statute, transferred to the new body in exchange for the issue of certain classes of Port stocks in certain proportions.

The statute also fixed the method for distribution of the receipts and provided in due order for payment of (a) the expenses of working, (b) interest on the different stocks that were issued, and on any loan raised, (c) for payment of the sum required by the statute for a sinking or redemption fund, (d) for the creation of a reserve, and directed that the ultimate balance should be made applicable for the benefit of the Port.

Part of the undertakings so acquired by the Port Authority consisted of the Tilbury Docks; and the question that arises for determination is in respect of the rating of this hereditament.

The difficulty is familiar. It is due to the fact that, under the Parochial Assessments Act (6 & 7 Will. 4, c. 96), s. 1, by which

(1) 11 H. L. C. 443.

(2) L. R. 9 Q. B. 84.

the value for rating is fixed, it is essential to apply the test of a yearly letting and taking between landlord and tenant for the purpose of determining what should be the net annual value on which the rates are levied. This policy is simple and capable of ready application in respect of property like that usually dealt with by means of leases or other tenancy agreements; but it becomes extremely difficult of application when used as a standard of value to property which, in the commercial sense, would never find a tenant at all. These difficulties have been avoided, even if they have not been overcome, by the process of beginning with the gross receipts of the undertaking and then, after making all the necessary deductions, ascertaining a balance, part of which is attributable to tenant's profits and the rest is assumed to be rent.

This course was pursued in the present instance, but the deduction which the Port of London sought to make for tenant's profits was disallowed by the Court of quarter sessions, who stated that, in fixing the rateable value, they had acted in accordance with a decision of long standing known as the *Mersey Docks v. Liverpool Overseers* (1), which, in their view, prevented any such deduction being made. A special case was accordingly stated in which the question upon which the opinion of the Court was sought was (so far as the matter now relevant is concerned) "Whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenant's profits?"

Now it is important to observe that the real question at issue is not the extent to which the deduction for tenant's profits should proceed, nor whether, in fixing the rateable value, all the circumstances associated with the character and limitation of the undertaking should be borne in mind: the question asked was the exact question, "Whether the quarter sessions were right in holding that they were precluded by law from making any allowance for tenant's profits?" The Divisional Court, doubtless acting on what they believed to be the effect of the authority of the [*Mersey Docks v. Liverpool Overseers* (1), without investigation affirmed the

(1) L. R. 9 Q. B. 84.

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
Lord
Buckmaster.

H. L. (E.) Court of quarter sessions, and the affirmation of their judgment
 1920 by the Court of Appeal approves and applies this decision.
 PORT OF LONDON AUTHORITY v. ASSESSMENT COMMITTEE OF ORSETT UNION.
 Lord Buckmaster.

It seems difficult, however, to believe that that was what the Court of Appeal really meant; for Bankes L.J. in giving judgment says that the answer to the first question submitted to the Court must be in the negative, and continues: "There is in my opinion no reason why the Court of quarter sessions should eliminate altogether from their consideration the question of tenant's profits."

Warrington L.J. stated his view that the real question was not whether the quarter sessions were precluded from making or having to make the allowance, but whether they were entitled to make or refuse it as one of fact to be decided by consideration of all the material circumstances. But this is not what the Court of quarter sessions said; they considered themselves bound by law to refuse the consideration of the items, and they did not leave themselves open to consider whether, in the words of Warrington L.J., "They are entitled either to decline to make or to make the allowance according as on the facts they find themselves justified in adopting the one course or the other." Duke L.J. took the same view.

With the statement quoted from Bankes L.J. I am in entire agreement. The question is essentially a question of fact, and in its determination the character of the undertaking, and in particular its statutory restrictions, are matters to be brought into account. The decision of the Court of quarter sessions, however, acting on what they regarded as the true meaning of the decision (1), says that as no profits can be earned for the benefit of the parties exercising the statutory jurisdiction, all tenant's profits should be eliminated.

With this I disagree. The conclusion would indeed lead to a strange and bewildering result. Before the acquisition and collection under one head of the property of the various docks, profits were earned by the different companies and paid to their respective shareholders and others interested in the various concerns. In ascertaining for rating purposes

(1) L. R. 9 Q. B. 84.

the then rateable value of these properties taken separately, it could not be disputed that deduction in respect of tenant's profits was rightly and properly made. The revenues now obtained are applied in payment of the exact equivalent of these profits to the several original owners and their successors according to their several interests in the stock issued to acquire their property. The result of the respondents' argument would consequently be that this simple operation, which could on no hypothesis have improved the rateable value of the property, had none the less resulted for purposes of rating in a very considerable increase of such value.

It is quite true that the hypothetical tenant of such an undertaking as the present must, on the hypothesis, be a tenant who is subject to the restrictions which have been imposed on the carrying on of the undertaking by the Legislature. This may materially affect the rateable value of the hereditament by reason of the fact that such restrictions may impose a limit upon its profit-earning capacity. But the method of application of such profits, however closely defined and regulated they may be, does not mean that they cannot be earned, and consequently that they may not be brought into consideration in determining the rateable value.

I turn now to consider how far the authorities affect the position. The earliest that is relevant to this case is the case of the *Mersey Docks v. Cameron*. (1) The statement of Lord Blackburn in that case is very material. He said: "Where there is an actual demise of property . . . the tenant . . . is rateable, without any regard to the purpose to which the rent is applied. A company forming docks under an Act of Parliament incorporating these Acts" (the Companies Clauses Act and the Harbour Docks and the Piers Clauses Act, 1847) "is bound to maintain the docks . . . and to allow the public to use the docks on payment of the rates. . . . The company . . . receives the rates . . . and it is common to have a maximum limit put on the rate of the

H. L. (E.)
1920
PORT OF
LONDON
AUTHORITY
v.
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.
—
Lord
Buckmaster.
—

(1) 11 H. L. C. 443, 463, 478.

H. L. (E.) 1920
 PORT OF LONDON
 AUTHORITY
 v.
 ASSESSMENT
 COMMITTEE
 OF
 ORSETT
 UNION.
 Lord
 Buckmaster.

dividend. . . . "It is indisputable that a company thus occupying a dock is an occupier, and rateable as such. Now if, without in any way altering the mode in which the docks are enjoyed by the public, or altering the rates leviable, or changing the harbour masters and others who manage it, we change the name of the body which occupies it from that of 'the Company' to that of 'the Board,' and if, instead of 'the Company' paying to the shareholders a maximum dividend on their capital, the 'Board' must pay to the same individuals the same identical sums, but call them 'interest on bonds,' instead of 'maximum dividend on share capital,' what difference does this make?"

The next case is just that which has given rise to the present difficulties: *Mersey Docks v. Liverpool Overseers*. (1) It is not easy from the report to be satisfied of all the circumstances and conditions attaching to the Mersey Docks. But it is clear from the argument that the point that is now under discussion was raised by counsel, who quoted in support of his contention *Reg. v. Southampton Dock Co.* (2), and it was in answer to that contention that Blackburn J. suggested the analogy of a lease of tithes, and the learned judges ultimately decided in plain terms that the Board was not entitled to a reduction for tenant's profits.

In the judgment of the Court a distinction that is obvious and sound in principle is drawn between the rateable value of premises and the actual profits that are made upon them, and they point out that profits are only material so far as they afford evidence of what may reasonably be expected to be made from the occupation. Reference is then made to the section of the Act that requires that all rates should be appropriated in payment of all expenses and charges made in collecting the same, and it then continues in these words: "But all the expenses and charges of collecting the rates actually incurred by the Mersey Dock Board, who are occupiers, are allowed for and deducted, and the contention for the Board is that we are bound, contrary to the fact, to suppose that the premises are let to an actual tenant, who would, contrary

(1) L. R. 9 Q. B. 84, 98.

(2) (1851) 17 Q. B. 83.

to the provisions of the Mersey Dock Act, levy in dock rates a sum, in addition to all the actual expenses of collection, for his own benefit."

I understand this as meaning that in the case then under decision the gross sums received did not include sums that could be used in payment of interest on bonds or securities representing the equivalent of ownership, and if this were so the decision might be correct; but it would have no application to the present case. If the original gross revenue cannot on the proper hypothesis include any sums which are the equivalent of tenant's profits, then obviously no deduction ought to be made under that head. This may have been the fact in that case and it is therefore quite possible that the statement may be supported by the special circumstances to which it refers, but if it was intended to lay down a general principle applicable in circumstances like the present, it is not, in my opinion, in accordance with the law.

The case of the *Sculcoates Union v. Dock Co. at Kingston-upon-Hull* (1) is an easier case to understand. Railway and tramway lines formed part of a dock system, but the dock companies were prohibited from taking any tolls for the use of the line. It was held that if tolls could be exacted a tenant could be found. It was decided by your Lordships' House, reversing the judgment of the Court of Appeal, that the statutory restrictions must be considered in this connection, and the rents that would have been earned but for these restrictions ought not to be regarded. In other words that decision emphasized and made clear a principle that must always be applicable to such cases. The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament. The character and the extent of the various deductions from the gross revenue must be fixed in relation to the conditions. This has not been

H. L. (E.)

1920

PORT OF
LONDON
AUTHORITY
v
ASSESSMENT
COMMITTEE
OF
ORSETT
UNION.

Lord
Buckmaster.

(1) [1895] A. C. 136.

H. L. (E.) done in the present case, and in my opinion therefore the
 1920 appeal should be allowed.

PORT OF
 LONDON
 AUTHORITY
 v.
 ASSESSMENT
 COMMITTEE
 OF
 ORSETT
 UNION.

Orders of the Court of Appeal and of the King's Bench Division discharged. Declared that the appellants are not precluded by law from making a claim to allowances for tenant's profits going beyond interest on capital employed, if on the facts they can establish such a claim. The respondents to pay the costs in the King's Bench Division and in the Court of Appeal, and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to answer the first question stated in the special case in the negative, and to direct that the costs of all parties in the proceedings, both previous and subsequent to the date of this Order, in the Essex Court of Quarter Sessions be dealt with in the said Essex Court of Quarter Sessions.

Lords' Journals, Jan. 30, 1920.

Solicitors for appellants : *E. F. Turner & Sons.*

Solicitors for respondents : *Kingsford, Dorman & Co.*

[HOUSE OF LORDS.]

MARTEN	APPELLANT ;	H.L. (E.)*
AND		1920
VESTHEY BROTHERS, LIMITED . . .	RESPONDENTS.	Jan. 30.

Marine Insurance — Ship — “ Final Port ” — Lloyd’s Policy — Method of Construction.

By a written clause inserted in the ordinary form of Lloyd’s policy a ship was insured on a voyage “ from any port or ports place or places on the River Plate to any port or ports place or places in France and /or the United Kingdom (final port), excluding Mediterranean via any ports in any order.” The policy was upon the ship only and against total loss only. The ship was loaded in the River Plate with a mixed cargo, and sailed from Buenos Aires for Dakar, where she was ordered to discharge part of her cargo at St. Nazaire and the rest at Havre. After discharging the final parcels of cargo at Havre she sailed for Barry for bunkers and was totally lost on the way :—

Held : that upon the true construction of the policy “ final port ” meant the final port of discharge either in the United Kingdom or in France, and that at the time of her loss the ship was not upon the voyage insured.

Held further (by Viscount Haldane and Lord Atkinson; Lord Dunedin dissenting, and Lord Buckmaster expressing no opinion upon the point) that, in the circumstances of the case, it was permissible, for the purpose of determining the nature and character of the adventure, to look at the printed words of the policy relating to goods and merchandise.

Observations on the practice of Lloyd’s of using a form of policy suitable for an insurance of a ship and her cargo for an insurance of the ship only.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal reversing a judgment of Bailhache J.

The action was brought by the respondents, who were importers of frozen produce from the River Plate, against the appellant, an underwriter at Lloyd’s, to recover the amount of his subscription to a policy of marine insurance for 17,000*l.*, part of a sum of 25,000*l.*, upon the steamship *Brodfield*.

The policy was dated September 16, 1916, and was upon

* *Present* : VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD BUCKMASTER.

H. L. (E.) the steamship *Brodfield* "at and from any port or ports place or places on the River Plate and/or tributaries to any port or ports place or places in France and/or in the United Kingdom (Final Port), excluding Mediterranean via any ports in any order " and was against total loss only.

1920
MARTEN
v.
VESTY
BROTHERS,
LIMITED.

This policy was in the ordinary form of a Lloyd's policy, and the above-quoted provision was inserted in writing. The provisions of the policy are stated in detail in the judgment of Lord Dunedin.

The question to be determined turned upon the meaning of "final port" in the policy, and was whether the *Brodfield* at the time of her loss was still upon the voyage insured.

The facts were agreed as follows :—

The steamer *Brodfield* loaded in the River Plate a cargo consisting of frozen meat in her insulated spaces requisitioned by the Government (meaning the British Government), and also 54 cases of frozen eggs shipped by private shippers. She loaded maize in her uninsulated holds and 312 horses on deck. The refrigerated meat and the maize were consigned to Dakar for orders. The maize was shipped to the order of the shippers, H. Ford & Co., Ltd. The frozen eggs were shipped to the order of John Layton & Co.

The steamer so loaded sailed from Buenos Aires on September 19, 1916.

On arrival at Dakar on or about October 5, 1916, the captain was ordered to discharge his maize at Havre. The frozen meat and the eggs were also ordered to be discharged at Havre. The horses were ordered to be discharged at St. Nazaire.

The cargo was discharged at St. Nazaire and Havre in accordance with the orders given, and on completion of the discharge at Havre on or about November 10, 1916, the steamer was completely free of cargo.

The steamer sailed from Havre for Barry for bunkers on November 11, 1916, and stranded on the Scillies on November 13 on the way to Barry, and was totally lost.

Bailhache J. held that the voyage contemplated by the policy finished when the last parcel of cargo out of the ship

was discharged at Havre, and that therefore the policy was not in force when the ship was lost. H. L. (E.)

The Court of Appeal (Bankes, Warrington, and Scrutton L.JJ.), on the contrary, held that "final port" was not equivalent to "final port of discharge," and that the ship had not arrived at the final port when she was lost, and they therefore gave judgment for the respondents for the amount of their claim.

1920
MARTEN
v.
VESTHEY
BROTHERS,
LIMITED.
—

Oct. 31; Nov. 3, 1919. *Leck K.C.* (with him *A. R. Kennedy*) for the appellant. This is a voyage policy, and the first thing to be done is to see what was the voyage contemplated by the parties, and for this purpose the printed words in the clause relating to the adventure, though referring to goods and merchandise, may be looked at. That clause shows that the adventure is to begin from the loading of the ship, and the concluding words of the clause afford an indication that the voyage is to end upon the complete discharge of the ship. The voyage must be within those limits. Upon the true construction of this policy "final port" means the final port of discharge on the voyage from the River Plate. At the time of her loss the ship was proceeding to Barry for a purpose wholly unconnected with the insured voyage, and was upon a new voyage.

[As to the meaning of "final port" he cited *Inglis v. Vaux* (1); *Moore v. Taylor* (2); *Hammond v. Reid*. (3)]

MacKinnon K.C. (with him *R. A. Wright K.C.*) for the respondents. On the plain meaning of the policy "final port" means the last port in which the vessel is either in France or in the United Kingdom. There is nothing in the policy to define the adventure insured as a cargo-carrying adventure or to limit the words "final port" to a port of discharge, and the policy was current at the time when the ship was lost. This policy is confined by the written words "to the ship" and the printed words relating to goods are to be disregarded and cannot be looked at, though they

(1) (1813) 3 Camp. 437.

(2) (1834) 1 Ad. & E. 25.

(3) (1820) 4 B. & Al. 72.

H. L. (E.) are left in the policy according to the common practice of underwriters.

1920

MARTEN

v.

VESTLEY
BROTHERS,
LIMITED.

Leck K.C. replied.

The House took time for consideration.

1920, Jan. 30. VISCOUNT HALDANE. My Lords, the question here is one simply of construction of the policy of marine insurance before us. I have come to the conclusion that the view taken of what the answer should be by *Bailhache J.* is preferable to that of the Court of Appeal.

It is agreed on all hands that, notwithstanding the wide words of the printed form used in its preparation, the introduction into this form of the words written in and appearing in italics is enough to limit the insurance to the vessel itself, and to exclude the interest in the cargo even of its owners. If it were not for the introduction of these words it would be plain that the insurance extended to the cargo also. But the policy is drawn up with the limiting words inserted into a printed form which by usage they are held to govern, and it is agreed that by the practice of Lloyd's the limitation is so sufficiently expressed as to make the policy one concerning the vessel alone. That, however, does not seem to me to render all the words remaining in the printed form wholly negligible. They are retained in the print and belong to the framework on which the actual contract is grafted, and outside of that general framework there is no language which constitutes an agreement. They suggest that the policy read as a whole had reference to a voyage, and that expressions which refer to the general character of the adventure insured can hardly be excluded from notice. These expressions point to an adventure terminating so far as concerns the ship insured when she, with her goods and merchandise, have reached a port where the cargo has been discharged and landed. The insurance is to endure until the ship with her cargo shall be arrived "at any port or ports, place or places in France and/or the United Kingdom (Final Port) excluding Mediterranean via any ports in any order," and the adventure is apparently not to terminate until

arrival "as above upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed."

Now unless the printed portion of the document is to be treated as wholly non-existent, I find it difficult to construe the meaning as being that the ship is to continue insured after she has discharged her cargo, and during an unlimited further period in which she may cruise from port to port, for instance along the coast of Ireland and in the Hebrides, picking up new freight. I cannot read it as meaning that the ship may turn herself into a tramp going about from port to port indefinitely round the United Kingdom, and still remaining insured although running heavy risks from submarines and otherwise, and yet with no increase of the single premium of 27s. 6d. per cent. which is all that is to be paid. It is difficult to see how terms so vague could define an agreement. I think that, however oddly drawn the document may be, there is one duty from which only an Act of Parliament can absolve judges who have to construe it, and that is to try to attach some significance to every expression that is at once appropriate and is yet not nullified by other and governing words within the four corners of the instrument. If the practice of Lloyd's really militated against this principle serious questions might arise. But I cannot think that it really does so. Applying the test, it appears to me that the words to which I have referred do indicate an intention, not excluded by any other expression in the policy, to make the voyage terminate with the discharge of the cargo. That took place in France, and there seems to me to be no reason for supposing that the voyage insured was to extend to an indefinite period following on this discharge. That is surely an interpretation which is as reasonable as it is natural. I may add that I agree with Scrutton L.J. in his impression that the words "final port" are not limited to the United Kingdom. They seem to me as they stand in their context to apply to France as well. But for the reason I have already given I find it very difficult

H. L. (E.)

1920

MARTEN

v.

VESTNEY
BROTHERS,
LIMITED.Viscount
Haldane.

H. L. (E.) 1920
 MARTEN
 v.
 VESTEY
 BROTHERS
 LIMITED.
 Viscount
 Haldane.

to take the expression "final port" so read as satisfied by "the last port in fact in the United Kingdom at which the vessel is." Like Bailhache J. I draw the inference from reading the instrument as a whole, even while construing it as relating to the vessel alone, that what the parties had in view was a voyage policy. No authority has been cited which appears to hinder me from coming to this conclusion, and I think that the references in the policy to discharge and safe landing of goods and merchandises, even though these last are to be regarded as wholly excluded from the subject-matter insured, do afford some guide to what was in the minds of those who thought the printed form a proper one to use as that on which even this restricted contract of insurance might be written.

My Lords, I am therefore of opinion that the judgment of the Court of Appeal ought to be discharged and that of Bailhache J. restored.

LORD DUNEDIN. My Lords, the screw-steamer *Brodfield* sailed from Buenos Aires on September 19, 1916, ladened with a cargo consisting of frozen meat, frozen eggs, maize, and horses. She arrived at Dakar, on the coast of Africa, on or about October 5, where she called for orders. She was ordered to discharge the frozen meat and eggs and the maize at Havre; the horses she was to discharge at St. Nazaire. She proceeded to St. Nazaire and Havre and discharged as ordered, and on or about November 10 she was completely free of cargo at Havre. At Havre the captain received orders to proceed to bunker in Cardiff. She sailed from Havre on November 11 to proceed to Barry, and was stranded and totally lost on the Scillies on her way there. All these facts are admitted. The question in the case is whether the owners of the ship can recover against the underwriters for loss of the ship under a policy of insurance. The policy of insurance is dated September 16, 1916, and was effected in London. It is in the well-known form known as a Lloyd's policy. The policy consists of a printed form with blanks which are filled up in writing. The filled-up parts in this

case so far as material are as follows ; “ Doth make assurance and cause themselves and them and every one of them to be insured, lost or not lost, at and from ” (so far all these words except “ themselves ” were in print, but I have to quote them to make the sentence intelligible) “ any port or ports place or places on the River Plate and/or tributaries to any port or ports, place or places in France and/or the United Kingdom (Final Port) excluding Mediterranean via any ports in any order.”

H.L. (E.)
1920
MARTEN
v.
VESTY
BROTHERS,
LIMITED.
—
Lord Dunedin.
—

The policy then proceeds in the printed form as follows :—

“ . . . beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said ship *as above* upon the said Ship, etc., and shall so continue and endure, during her Abode there, upon the said Ship, etc. ; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, etc., and Goods and Merchandises whatsoever, shall be arrived at *as above* upon the said Ship, etc., until she hath moored at Anchor Twenty-four Hours in good safety, and upon the Goods and Merchandises until the same be there discharged and safely landed ; and it shall be lawful for the said Ship, etc., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever *or wheresoever and for all purposes* without Prejudice to this Insurance. The said Ship, etc., Goods and Merchandises, etc., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at ” (then come the following written words) “ Seventeen thousand pounds on safe arrival of steamer only.”

This is followed by another written clause as follows :—

“ This insurance is against total loss only to be paid in the event of the total and/or constructive and/or arranged total loss of the Steamer. Warranted free of all average. Warranted free from any Claim consequent on loss of time whether arising from a peril of the Sea or otherwise. No Claim to attach hereto for delay, deterioration and or loss of Market.”

Then follow the printed words touching the adventures

H. L. (E.) and perils which it is unnecessary to quote, and the final portion ends with the ordinary N.B. :—

1920
MARTEN
v.
VESTY
BROTHERS,
LIMITED.
Lord Dunedin.

“ N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded ; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent. ; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded, *sunk, burnt, on Fire or in Collision.*”

There are appended other clauses in writing dealing with war risks which are also unnecessary to quote.

Now the question raised is very short and sharp. All are agreed that the vessel was covered till she discharged at Havre. The insurers say the risk ended when she had there discharged her cargo ; the owners say she was still insured on her voyage from Havre to Barry. Bailhache J., before whom the case was tried, found in favour of the underwriters. His judgment was reversed by the Court of Appeal, Scrutton L.J. evidently considering the case one of considerable difficulty.

My Lords, I believe that we are unanimous in thinking that the judgment of Bailhache J. was right and that the appeal should be allowed. But the appellant put forward an argument of far-reaching importance. The argument is that in attempting to discover the duration of the risk which is insured against for the ship alone you are at liberty to draw conclusions from the presence of the words in the printed form which refer to the insurance of goods. This is, in my humble opinion, so entirely inconsistent with the practice of nearly two centuries, and would be held to be such a disastrous innovation by the mercantile world, that I feel constrained to express my earnest dissent from it. The asseveration or denial of this argument is infinitely more far reaching and more important than the decision on the merits of this particular case. The form known as “ Lloyd’s Policy ” is a very ancient document. It undoubtedly owed its original form to the time now long past when the

ordinary state of affairs was that the shipowner and the merchant were one and the same person. Like Antonio in the *Merchant of Venice*, he sent out his argosy laden with his own goods to be disposed of in foreign lands and to bring back foreign goods in exchange.

The oldest policy known in England is of date 1613, a copy of it being preserved in the Bodleian Library at Oxford, and differs little from the policy of the present day; but the actual printed form of policy which we now have was arranged in 1779 at a general meeting of members of Lloyd's, who undertook to establish a particular form of marine insurance policy and not to allow any alterations in that policy. With the exception of the introduction in 1874 of what is known as the "Waiver Clause" and the alteration in 1850 of the phrase at the commencement of the policy "In the name of God Amen" to "Be it known that" the printed policy at present is the policy of 1779.

Now undoubtedly it might have been better—it would have saved this and perhaps other controversies—if when modern times had come the underwriters had reformed this document and adopted a separate form for insurance on ship, goods and freight respectively when the insurance was only to cover one of these three things. But they have not done so. Nay, more, they have not in practice even taken the trouble, when a policy is effected on one, to delete the phrases obviously only applying to the other two things which may be insured. But they leave blanks in the policy, and these blanks are filled up so as to fix what is the subject insured, and additional and special clauses are often written on the margin or affixed to the policy by gum.

My Lords, this may be a bad practice but it is a universal practice, and I venture to say that no underwriter who has undertaken a risk on ship alone by reason of a voyage policy ever dreams that his undertaking is to be read in the light of what the printed form says about goods. After all, the question is what was the contract made by the parties, and it is our business to decide that and not to form rules as to how commercial men ought to conduct their business.

H. L. (E.)

1920

MARTEN

v.

VESTEY
BROTHERS,
LIMITED.

· Lord Dunedin.

H. L. (E.) And in face of the universal practice of underwriters to use
 1920 the form in this way, it is, in my opinion, untrue to say
 MARTEN that they have contracted that an insurance of ship alone
 v. shall be interpreted in the light of printed words which are
 VESTEY appropriate only when the insurance is not effected on ship
 BROTHERS, alone but on goods.
 LIMITED.
 Lord Dunedin.

In approaching this case I therefore disregard altogether the parts of the policy contained in the printed form which refer to an insurance of goods. Attempts to invoke the inappropriate parts of such a policy to construe the appropriate have been made before this. I quote the words of Lord Penzance in the case of *Dudgeon v. Pembroke* (1): "It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to the ship, the policy is something less, or something more, than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognised in Courts of law, to permit of any such conclusion."

I may at once point out another circumstance which is, in my judgment, strongly in favour of that view. The learned counsel for the appellant, though I think somewhat invited by some of your Lordships, did not dare to say that on this policy the ship might not have proceeded in ballast from the River Plate. Yet, if the clause as to merchandise is to be looked at for the purpose of deciding that this was a cargo-carrying ship, then a voyage in ballast would be contrary to the terms of the policy.

I now come to the consideration of the case. No one doubts that this is a voyage policy. The sole question therefore, is, what is the voyage? The beginning is clear—"at and from the River Plate." What is the termination? All the authorities agree that the terminus ad quem in a voyage

(1) (1877) 2 App. Cas. 284, 293.

policy must be clearly specified, otherwise the policy is void. That does not mean that there may not be a group of ports designated, but it is available in consideration of one aspect of this case. There is a certain amount of authority which, although not directly in point, touches the fringe of this question. Thus, in *Camden v. Cowley* (1) Lord Mansfield, after consulting a jury who had examined before them insurance brokers and others conversant with the trade, held that on an insurance of a ship from London to Jamaica, insurance ended when she touched at the first port and delivered part of her cargo, though she had still on board some cargo to deliver at other ports of Jamaica. With that may be contrasted *Moore v. Taylor* (2), where the ship was chartered at and from the West India Islands, Jamaica and San Domingo excepted, to her port or ports of discharge in the United Kingdom; during her stay there and thence back to Barbados, and all or any of the West India Islands, Jamaica and San Domingo excepted, until the ship should be arrived at her final port as aforesaid. She discharged her cargo substantially at Barbados, and was proceeding to Berbice when she was lost. It was held that she was not covered, because the jury had held that the cargo was substantially discharged at Barbados, and that final port must be taken as final port of discharge.

Now that case would be exactly this were it not for the fact that "as aforesaid" is added to the words "final port," and in the earlier part of the policy "port" is called "port of discharge." Littledale J. puts his judgment on that fact, but Parke J. puts his judgment on broader grounds. He says "'final port' must mean the port which is final with reference to the goods to be taken on board in the United Kingdom." But it is particularly instructive to notice the argument of Sir James Scarlett, who was counsel for the owners. He is reported thus: "The owner could not decide, before her arrival at Barbadoes, at what place she should terminate the voyage, and commence a new adventure; and accordingly the words inserted in the policy are, 'arrived

H. L. (E.)
1920
MARTEN
v.
VESTHEY
BROTHERS,
LIMITED.
—
Lord Dunedin.
—

(1) (1763) 1 W. Bl. 417.

(2) 1 Ad. & E. 25, 27, 29.

H. L. (E.) at her final port,' not 'her final port of discharge.' It could
 1920 not be contended that, if she had sailed from Liverpool
 MARTEN without any cargo at all, she would not have been protected
 v. by the policy to Barbadoes : it cannot, therefore, be held
 VESTY that the duration of the protection, in the present case, is
 BROTHERS, to be measured by the time the cargo remains on board ;
 LIMITED. that the duration of the protection, in the present case, is
 Lord Dunedin. to be measured by the time the cargo remains on board ;
 — for, as the policy is on the ship alone, its construction cannot
 be altered by the circumstance of her having, or not having,
 a cargo."

That argument, unsuccessful there, is really the same as the argument in this case.

My Lords, it seems to me that the question of what is the voyage insured is a question of fact. It is to be gathered from the expressions under the policy, and nothing that was done could contradict them. If they are so vague as to be incapable of interpretation, the policy is void. One necessity of defining a voyage consists in giving the beginning and the end of the voyage. If therefore a policy defines in sufficiently precise language the terminus a quo and the terminus ad quem, nothing that was done in the actual voyage could affect the interpretation of the insured voyage. But where, as here, there is given a facultative terminus ad quem it is, I think, legitimate to see what was done in the voyage of the ship, and to use that knowledge not perhaps in the strict sense to interpret the words used, but to decide what is the application which falls to be given to the words used in the actual circumstances of the case. Now, here, what do I find ? I find that the ship admittedly carried cargo, and that she admittedly discharged all that cargo in France. I find also that the instructions to the captain as to what he was to do after Havre are contained in a letter produced in the following terms : " We have arranged for you to bunker in Cardiff, under contract with Messrs. Evans & Reid, sufficient to take the steamer out to the River Plate and back to Dakar, where you will replenish as on the last occasion."

In these circumstances I hold that the expression " final port " in this policy was equivalent to " final port of

discharge," and that the progress of the ship from Havre to Barry was not the finishing of the old voyage but the preparation for the inception of a new voyage. I agree that the final port might have been in the United Kingdom, but once dissociate "final port" from "final port of discharge," then there seem to me no termini habiles to fix what is the final port. There need not have been finality at Barry, and, if that is so, there is no such proper determination of the terminus ad quem as will save the policy from vitiation on the ground of uncertainty.

I am therefore of opinion that the appeal should be allowed and that the judgment of Bailhache J. be restored.

LORD ATKINSON. My Lords, the facts have already been stated. During the argument of this case it was pressed upon your Lordships that the underwriters had, according to their inveterate custom, been unwise enough to use a printed form of policy suitable for an insurance covering both a ship and her cargo, while, in fact, all that was insured against was the loss of or injury to the ship. That no doubt is so. But the argument which, as I understood it, was based upon this fact was, in my view, fallacious. It was, it appeared to me, contended that because of this clumsy way of doing business the policy was to be construed as if all the printed matter dealing with goods and merchandise had been deleted from it. It may well be that where a printed form is used containing words utterly inapplicable to the subject-matter of a contract, the contract should be construed as if those words had been deleted; but that is emphatically not this case. Here the provisions as to goods and merchandise are not inapplicable to the contemplated adventure of the ship. They are on the contrary linked to it and affect it. The adventure is the voyage of this steamer from some port or ports, place or places, on the River Plate, or its tributaries, to any port or ports, place or places in France or the United Kingdom (Final Port). These are the termini of the voyage. But the adventure, against loss in which the ship is insured, does not begin till the goods and merchandise mentioned

H. L. (E.)

1920

MARTEN

v.

VESTNEY
BROTHERS,
LIMITED.

Lord Dunedin.

H. L. (E.) in the first paragraph of the policy have been loaded. The words in the second clause touching this point run as follows :
1920
MARTEN
v.
VESTHEY
BROTHERS,
LIMITED.
Lord Atkinson. Those words are in print, but there follow five words, the first two in writing and the following three in print. They run, "*as above* upon said ship, etc." The etcetera evidently refers to the words in the earlier paragraph, "Body tackle, apparel, ordnance, munition, artillery, boat and other furniture." The plain meaning of these words is that the adventure, both as to the goods and merchandise and as to the ship and her furniture, is to begin from the loading of the former on board the ship. That event fixes the beginning of the adventure for both. In no other way is it fixed. The reach of the policy, the loss it covers, is no doubt by the written words "safe arrival of ship only," restricted to the loss or injury to the ship. The printed words referring to goods and merchandise cannot of course extend that risk, but they so limit the adventure that, in my view, they can be looked at solely to determine what the nature and character of that adventure is. Having that effect in this case, as I think they have, then, whatever be the inveterate practice of any commercial body however eminent and distinguished, I am, I think, not only justified, but bound, upon this question of law, the construction of this policy of assurance, to have regard to them. Though the loss of the steamer and that alone is insured against, it is I think clear that the intention of the parties was that the vessel should start upon her voyage and complete a portion of it at least as a cargo-carrying ship. That this was what the parties contemplated is, in addition, clear from the written provision near the end of the policy : "No claim to attach hereto for delay, deterioration and/or loss of market." It has been suggested that there is no provision in the policy prohibiting the sending of this steamer from and to the named ports in ballast. No doubt there is no provision prohibiting such an adventure in so many words ; but, in my view, there is an implied provision prohibiting it, in this,

that the adventure covered by the policy is one to begin with the loading of goods and merchandise, not ballast, on board the steamer. The statement of facts shows that the parties carried out that intention. She was loaded with a very miscellaneous cargo. Part of her cargo, consisting of the refrigerated meat and maize, was consigned to Dakar for orders. On arriving there she was ordered to discharge this maize, the frozen meat and the eggs she carried on to Havre, and the horses she carried on to St. Nazaire.

My Lords, during the argument I could not resist putting to myself, and indeed I fear to counsel, the question : If the voyage was not intended to end, and did not in fact end, at her final port of discharge, Havre, where was it designed to end ? I concur with Bailhache J. and, as I understand, Scrutton L.J., in thinking that the so-called final port may, owing to the use of the words "and/or," be situate either in France or in the United Kingdom. I assume for argument's sake, however, that the final port must be in the United Kingdom. There is nothing in the policy of assurance to fix the final port. I concur with Scrutton L.J. in thinking that, if so, it can only mean the last port in the United Kingdom which the vessel enters. Well, the policy of insurance, in a clause partly in print and partly written, provides "that it shall be lawful for the said ship, etc., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever or wheresoever and for all purposes." There is therefore in my view, no escape from the alternative, either the voyage covered by the policy ended at the final port of discharge of the cargo, Havre, or it extended to any voyages her owners might send her upon in the coasting trade of the United Kingdom, carrying cargo from port to port in England, Scotland or Ireland until such time as she should pay her last visit to one of those ports, however numerous those coasting voyages might be, and whatever length of time she might be engaged in making them. There is nothing to show that Barry was intended to be the last port in the United Kingdom which she would enter.

H. L. (E.)
1920
MARTEN
v.
VESTAY
BROTHERS,
LIMITED.
—
Lord Atkinson.

H. L. (E.)
 1920
 MARTEN
 v.
 VESTY
 BROTHERS,
 LIMITED.
 Lord Atkinson.

My Lords, it appears to me to be impossible to give to this policy of assurance a construction so wide as to cover the risk attending such coasting trading. And if that be so, as I think it is, then the only reasonable construction the policy can, in my view, receive is that which fixes the end of the voyage it covered, and was intended to cover, at Havre, the vessel's final port of discharge. I think the decision in the case of *Moore v. Taylor* (1) is entirely consistent with this conclusion. In that case, as in this, the ship alone was insured. According to the headnote the insurance was made at and from St. Vincent, Barbados, "and all or any of the West India Islands to her port or ports of discharge and loading in the United Kingdom, during her stay there, and thence back to Barbadoes or all or any of the West India Colonies, until the ship shall have arrived at her final port." The vessel arrived at Barbados on August 2, 1821; the whole of her cargo was, as the jury found, discharged at Barbados. She then made preparation to sail from Barbados on August 11 on another voyage, but was wrecked in a hurricane on the night of the 10th. Littledale J. in giving judgment said: "The only question for us is the construction of the policy. Now the first expression used in it, relatively to the duration of the adventure, is 'port or ports of discharge and loading in the United Kingdom'; the words 'final port' do not occur till a later part of the instrument, and they must be interpreted by the aid of the earlier words. I am of opinion, therefore, that the risk was meant to end as soon as the substantial purpose of the voyage, that is, the delivery of her cargo, was completed; and I cannot agree that it was to continue while the empty ship was on a seeking voyage for a fresh cargo."

Parke J. said: "It is contended that the adventure continued, not only till the cargo was discharged, but during all the time for which the vessel should be seeking a fresh cargo. But it seems to me impossible to put so wide a construction on the policy. 'Final port' must mean the port

(1) 1 Ad. & E. 25, 29.

which is final with reference to the goods to be taken on board in the United Kingdom." H₁ L. (E.)

Just as it was considered impossible in that case to construe the policy of insurance as covering the risk while the empty vessel was on a "seeking voyage" for a fresh cargo, so here it is impossible, I think, to construe this policy as covering a voyage in ballast to Barry and the possible coasting trading of the ship insured from port to port in the United Kingdom. I adopt the only alternative left, as I conceive it, and construe the policy as intended to cover, and actually covering, the risk attending a voyage terminating at Havre.

I think that the decision of the Court of Appeal was erroneous and should be reversed, that the judgment of Bailhache J. was right and should be restored, and that the appeal should be allowed with costs.

LORD BUCKMASTER. My Lords, I agree with the view already expressed that according to the true effect of this policy the voyage that was contemplated was the voyage that was ended when the vessel discharged her cargo, and this conclusion can in my opinion be reached without calling in aid the printed portions of the form which relate to a loaded vessel. It is therefore unnecessary to consider the extent to which the common structure of the policy affects the interpretation of the added words, and upon this question I express no opinion.

Order of the Court of Appeal reversed and judgment of Bailhache J. restored. The respondents to pay the costs in the Court of Appeal and also the costs of the Appeal to this House.

Lords' Journals, Jan. 30, 1920.

Solicitors for appellant: *Parker, Garrett & Co., London.*

Solicitors for respondents: *Ballantune Clifford & Co.*

1920
MARTEN
v.
VESTNEY
BROTHERS,
LIMITED.
Lord Atkinson.

[HOUSE OF LORDS.]

H. L. (E.) LONDON AND NORTH WESTERN)
 1920 RAILWAY COMPANY : : : :) APPELLANTS
 Jan. 30.

AND

RICHARD HUDSON AND SONS, LIMITED RESPONDENTS.

Carrier—Goods—Railway Company—Damage on transit by Water owing to defective Sheeting—Loading and Sheeting performed by Consignors under Arrangement with Railway Company—Authority of Consignor—Liability of Railway Company.

The plaintiffs, who were purchasers of calico goods lying at K.'s works in Birmingham, requested K. to forward the goods to them at Manchester. In 1903 K., who had private sidings connecting with the London and North Western Railway, entered into an agreement with the railway company, in accordance with s. 4 of the Schedule of Maximum Rates and Charges to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, whereby K. performed for himself the services of loading and sheeting goods consigned in separate trucks from his sidings to the railway company for carriage (the railway company supplying the trucks and the sheets), and was allowed by the railway company a rebate off the charge for carriage in respect of these services. By a consignment note of August 21, 1917, K. consigned the calico goods as therein specified, ready loaded and sheeted, in a truck to the railway company for carriage and delivery to the plaintiffs at Manchester, the plaintiffs to pay the carriage, and the railway company signed an acknowledgment on the consignment note that the goods were received in good condition. On delivery the railway company charged the plaintiffs at a rate which included the loading and sheeting. The goods were damaged by water during the transit owing to defects in the sheet by which they were covered. The plaintiffs, who had no knowledge of the agreement of 1903, sued the railway company for damages:—

Held (by Lord Dunedin, Lord Atkinson and Lord Buckmaster; Viscount Haldane and Lord Phillimore dissenting), that the railway company were liable to the plaintiffs for the damage caused by the defective sheeting, either as common carriers or under the contract contained in the consignment note, irrespectively of the private agreement between the company and K. as to terminal services.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing

* *Present*: VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD BUCKMASTER and LORD PHILLIMORE.

an order of the Divisional Court and restoring a judgment of the county court judge of Lancashire.

The action was brought in the Manchester County Court by the respondents against the appellants for 42*l.* in respect of damage done to certain bales of white cotton cloth.

The respondents, by their particulars of claim, alleged that the appellants were common carriers of goods for hire from Birmingham to Manchester, and that on August 21, 1917, the respondents delivered or caused to be delivered to the appellants, and that the appellants as such common carriers received from the respondents, the said bales, and that the appellants agreed as such carriers to carry the goods safely from Birmingham to Manchester for hire; that the appellants did not safely carry the goods and that many of them were damaged during transit and were found to be in a very wet condition. The amount of the damages was agreed.

The facts are fully stated in the judgment of Viscount Haldane and are summarised in the headnote.

The county court judge found that the damage was caused by the use of a defective sheet and that Messrs. Kynochs (called K. in the headnote) in loading and sheeting the goods acted as the agents of the appellants, and that the appellants were therefore liable to the respondents for the amount of the claim.

The Divisional Court (Rowlatt and Sankey JJ.) held that the contract for carriage between the appellants and the respondents was in respect of goods already loaded and sheeted and that the only remedy of the respondents was against Messrs. Kynochs.

The Court of Appeal (Bankes, Warrington and Duke L.JJ.) agreed with the view of the contract taken by the county court judge.

1919. Nov. 27, 28. *Disturnal K.C.* and *Eustace Hills K.C.* (with them *E. Stainton*) for the appellants. The contract made by the appellants with Messrs. Kynochs was to carry the goods as packed, loaded and sheeted by Messrs. Kynochs. Those services were performed by Messrs. Kynochs as

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED

H. L. (E.) principals and not as agents for the appellants, and the
 1920 appellants therefore cannot be made responsible for the
 LONDON negligence of Messrs. Kynochs. The fact that the appellants
 AND collected the money for loading and sheeting from the
 WESTERN respondents cannot alter the contract made by the railway
 RAILWAY company with Messrs. Kynochs as the agents of the respond-
 COMPANY ents. The money was collected partly for the appellants
 v. and partly for Messrs. Kynochs.
 RICHARD
 HUDSON
 AND
 SONS,
 LIMITED.

Holman Gregory K.C. and *Roe Rycroft*, for the respondents.
 The appellants were common carriers of the goods for reward
 and were under a duty to carry the goods safely and deliver
 them to the respondents. Messrs. Kynochs in loading and
 sheeting the goods under their private arrangement with
 the railway, were the agents of the appellants and not the
 agents of the respondents. The sheets were supplied by
 the appellants to Messrs. Kynochs and the appellants are
 liable for any damage arising from such sheets being
 defective. The appellants having demanded payment of the
 full rate of carriage, including the charge for sheeting and
 loading, cannot be heard to say that they are not liable for
 such sheeting and loading.

[LORD DUNEDIN referred to *Dutton v. Solomonson*. (1)
Disturnal K.C. in reply cited *Hart v. Baxendale*. (2)]

1920. Jan. 30. VISCOUNT HALDANE. My Lords, what
 is difficult in this case is to draw the proper inference from
 the insufficient materials contained in the only facts which
 the learned county court judge was able to find as to the
 contract made.

Shortly stated, the circumstances which gave rise to the
 question with which he had to deal were as follows: In
 August, 1917, the respondents bought from the Ministry of
 Munitions twenty-seven bales of calico goods which were
 then lying at the Lion Works of Messrs. Kynochs, Ltd., a
 controlled establishment at Birmingham. The respondents
 requested Messrs. Kynochs to forward the bales to them at
 Manchester, the carriage to be paid by the respondents.

(1) (1803) 3 Bos. & P. 582.

(2) (1867) 16 L. T. 390.

Kynochs, whose business was that of manufacturers having to make large and frequent consignments, possessed several miles of private sidings connecting with the appellants' railway, and it was their regular practice to load the goods they consigned into trucks on these sidings, and to cover the goods with the sheets requisite for protecting them from rain and dirt when in the trucks. After they had constructed these private sidings and had organized their system of loading, which was in 1903, Kynochs made arrangements with the appellants, with whose railway the sidings were as I have said connected, for a diminution of the charges of the latter for carrying, in cases where Kynochs had themselves thus loaded the trucks on their own sidings. This arrangement was effected in view of the proviso to s. 4 of the schedule of maximum rates and charges to the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, which provided that where merchandise conveyed in a separate truck is loaded or unloaded elsewhere than in a shed or building of the railway company, the latter may not charge to a trader any service terminal for the performance of any of his said services, if the trader has requested the company to allow him to perform the service for himself and the company have unreasonably refused. Since Kynochs, who had made such a request, commenced to perform for themselves the services of loading and sheeting on their private sidings the appellants have not charged them for these services, but have allowed them on this account a rebate of 2s. 3d. per ton from the normal charge for carriage, which was inclusive of such services.

In respect of the bales, the subject of this litigation, the appellants did no checking and exercised no superintendence while the bales were being loaded and covered on the trucks on Messrs. Kynochs' siding, and the bales were loaded and sheeted exclusively by the latter themselves under the arrangement referred to. The practice of the appellants was to supply to Kynochs the trucks and sheets required, but Kynochs had been, at all events during the period of

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY

v.

RICHARD
HUDSON
AND
SONS,
LIMITED.Viscount
Haldane.

H. L. (E.) 1920
 LONDON
 AND
 NORTH
 WESTERN
 RAILWAY
 COMPANY
 v.
 RICHARD
 HUDSON
 AND
 SONS,
 LIMITED.
 Viscount
 Haldane.

the controversy, in the habit of using trucks and sheets which happened to have arrived on their sidings with inward traffic. In the present case the truck on to which the bales were loaded was one belonging to the North Eastern Railway Company, and the sheet used was one belonging to the Lancashire and Yorkshire Railway Company. It does not appear that any objection ought to have been taken to the adoption of this course. The probable reason is that under the Government control which obtained in the period of the war the pooling of wagons was a common practice.

Kynochs, having acceded to the request made to them by the respondents to forward the bales to Manchester, and having loaded them as described on a truck and sheeted them, directed the appellants to receive and deliver them to the respondents at the address of the latter in Manchester. They gave to the appellants a consignment note containing this direction, and specifying, in a column which contained the number and species of the goods to be forwarded, the twenty-seven bales with their marks, and in another column their weight. At the head of these columns there was described the truck on which the goods were loaded, as "38150 North Eastern Railway," and in yet another column, in which the name of the person who was to pay the carriage was to be entered, there appeared the word "Forward," meaning that the charge for carriage was to be paid by the consignees on delivery. At the foot of the consignment note appeared, with the signature of F. Allen, one of the officials of the appellants, the words "Received in good condition by F. Allen." This consignment note appears to have been the only document which contained anything in the nature of a contract. The appellants had no instructions about the terms on which they were to convey the goods except from Kynochs.

The bales when they were delivered in Manchester had been damaged by moisture to the extent of 42*l.* 6*s.* This damage was caused, as the county court judge found, by the use of a defective sheet which had been put over the bales by Kynochs' servants when loading them on to the truck.

The sheet had parts in it where the waterproof covering had deteriorated and become pervious to moisture, but it is not found that this was in any way known to the appellants.

The appellants delivered the bales to the respondents and collected from them the entire amount of the charge for carriage. They then paid out of it to Messrs. Kynochs the amount of the rebate due to the latter for the services of loading and sheeting to which I have referred.

The respondents brought an action in the county court against the appellants for the damage to the bales. The action was tried by the county court judge, who decided for the respondents and awarded them damages of the amount stated above. His view apparently was that Kynochs, at the request of the respondents and as their agents, had effected a contract between the appellants and the respondents for the carriage of the bales, but that by private arrangement with the appellants, which did not affect the contract and which was unknown to the respondents, Messrs. Kynochs acted as the sub-agents of the appellants in doing the loading and sheeting, for negligence in which the appellants as the principals thus became responsible to the consignees. On appeal to the Divisional Court the learned judges there, Rowlatt and Sankey JJ., took a different view. They held that the actual contract entered into by the appellants with the respondents through Kynochs as their agents was merely a contract to carry the bales as loaded and sheeted by Kynochs, who performed this service on their own account as principals and not as agents for the appellants. Judgment was therefore given for the appellants.

The respondents appealed to the Court of Appeal, who reversed the judgment of the Divisional Court. The learned Lords Justices agreed with the county court judge in holding that in the loading and sheeting of the truck Kynochs acted in contemplation of law as agents for the appellants. It might have been different if Kynochs had made a contract with the railway company for carriage and delivery of the bales for their own account and at their own expense. But

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANYv.
RICHARD
HUDSON
AND
SONS,
LIMITED.Viscount
Haldane.

H. L. (E.) that was not the contract made. Kynochs actually requested the railway company to carry and deliver to the respondents as the consignees specified in a consignment note, and they must be taken to have brought about, as agents for the respondents, a contract by the railway company to perform the whole of the services, not the less that a part of these, the loading and sheeting, were to be performed by Kynochs as agents for the company, and were to be paid for by the company out of the amount to be obtained by them for themselves from the consignees.

1920
LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED.
—
Viscount
Haldane.

My Lords, it is not altogether an easy question which of these views of the contract is the true one. The reason is the imperfect character of the evidence. Only after some hesitation have I arrived at the conclusion that the view taken by Rowlatt and Sankey JJ. in the Divisional Court was the right one. I think that the determining consideration is to be found in what the Legislature has laid down in s. 4 of the Schedule to the Act of 1891, to the terms of which I have already referred. The proviso forbids the railway company to make any charge at all for performing such a service as the sheeting and loading by consignors who have properly, as in the present case, elected to perform it themselves. I am unable to see, having regard to the language of this proviso, how Kynochs can be said to have done what they did, excepting on the footing of having done it on their own account and as principals. I cannot think that it makes any difference that they were to be paid by the railway company out of the total sum the latter recovered from the consignees, or that the consignees knew nothing of the arrangement. They must at least, having regard to the provisions of the statute, be taken to have known that the arrangement actually made was a possible arrangement, and it does not appear that they gave any special directions to Kynochs how or on what footing the latter were to forward the bales from their premises at Birmingham to the respondents' address at Manchester. Kynochs appear to me to have been free to do the part of the service they performed on their own

account if they chose, for the statute had put them in a position to do so, and there was nothing in the least improper in their taking advantage of the power conferred on them to do part of the work themselves which they had undertaken to do or to get done. I do not see why Kynochs should not, if they pleased, have claimed directly against the respondents for payment for this part. It is true that when anyone who is in Kynochs' position, as agent for another person to whom goods are to be carried and delivered, directs a railway company to convey the goods to and to obtain payment from him, the consignee may be looked on as a principal brought, through an agent sufficiently authorized for this purpose, into direct contractual relation with the railway company. But the question always remains, what the contract is which the agent has brought about? Here it appears to me that the contract was to take over and convey a truck already loaded and sheeted by Kynochs. The sheet was defective and let in moisture. For this Kynochs may possibly be responsible to the respondents, but I am unable to see how the railway company are so. No doubt as common carriers they are insurers. But their liability as insurers is only in respect of what happens during their custody of the goods entrusted to them as bailees for carriage, and against loss or damage to these goods in the condition in which they were when delivered to them to be carried. They are not responsible for the consequences of any latent defect in the subject-matter of their contract of carriage. It seems to me that in the circumstances of the present case all they undertook to do was, in accordance with the provisions of the statute of 1891, to haul a loaded and sheeted truck. That there was a defect in the sheet was not due to them, but to a cause antecedent to the commencement of their responsibility, and it was the antecedent cause that gave rise to the damage. As was pointed out by Willes J. in *Blower v. Great Western Ry. Co.* (1), the liability of a railway company as a common carrier does not extend to damage consequential on an inherent "vice" in the article

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED.

Viscount
Haldane.

(1) (1872) L. R. 7 C. P. 655, 662, 663.

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED.

Viscount
Haldane.

carried. "If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties." That very learned judge quotes with approval the statement of the law in Story on Bailments where it is said: "Although the rule is thus laid down in general terms at the common law, that the carrier is responsible for all losses not occasioned by the act of God or of the King's enemies; yet it is to be understood in all cases that the rule does not cover any losses not within the exception which arise from the ordinary wear and tear and chafing of the goods in the course of their transportation, or from their ordinary loss, deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof." Story goes on in the passage cited by Willes J. to give as an illustration the case of the goods "not being properly put up and packed by the owner or shipper; for, the carrier's implied obligations do not extend to such cases."

My Lords, this principle appears to me to rule out any liability sought to be fastened on the appellants in this case arising merely out of their position as common carriers, and to leave the matter to be disposed of according to the answer given to the question, "What was the actual contract in the case?" For the reasons I have stated, I am of opinion that the judgment of the Court of Appeal should be reversed and that of the Divisional Court restored.

LORD DUNEDIN. My Lords, in view of the divergence of judicial opinion in the Courts below and in your Lordships' House this cannot be called a clear case. I do not recapitulate the facts.

The respondents sue the appellants for damage to goods which belonged to the respondents and were carried by the appellants. The action is based on the fact that the appellants are common carriers and carried the goods as such.

That a common carrier is an insurer of goods entrusted to him for carriage, and can only excuse himself on the ground of act of God, or of inherent vice (in which expression I include bad packing) of the goods themselves is axiomatic. Now Lord Mansfield in *Forward v. Pittard* (1) speaks of this obligation on the carrier's part as an obligation independent of the contract. By that I understand that it is not an adjected term to the contract as made, but is an obligation which attaches from the fact of the goods being carried by a common carrier, in favour of the owner of the goods, whoever he may be. For indeed in many common cases it would seem to be inaccurate to speak of a contract of carriage as being made between the carrier and the consignee. Take the ordinary case of A. buying goods from B. to be delivered to A., B. being resident at a distance from A. It is settled that delivery to the carrier is delivery to A.; but suppose that the goods are entirely disconform to contract, and that A. refuses to receive the goods, A. could not be sued on the contract. No doubt there is in the case of A. receiving the goods a resulting contract between A. and the carrier, but that contract is inferred from the receipt of the goods by the carrier, and the acceptance of the goods when carried by the consignee, and is not in the proper sense made by the person who delivers the goods. The same view, that the obligation is independent of the contract, is a corollary to the decisions which in view of the provisions of the County Court Act settled that an action for damages at the instance of the owners of the goods against the carrier could be held as an action of tort and not of contract.

Now, my Lords, if these views are correct, they dispose of the present case, for Hudsons did not require to have recourse to the contract, if any, between Kynochs and the London and North Western Railway Company, but may rely on the common law duty of the railway as common carriers to carry the goods safely.

But even if these views were not correct, I should still come to the same conclusion. The view of the Divisional

(1) (1785) 1 T. R. 27, 33.

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY

v.

RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord Dunedin.

H. L. (E.) Court is that there was a contract made by Kynochs as agent
 1920 for Hudsons, that in terms of this contract made, the railway
 LONDON company were not answerable for the loading, and that as
 AND the damage came from improper loading, Hudsons cannot
 NORTH recover. Now, what was the contract? Sankey J. says
 WESTERN that the contract was that the railway company should haul
 RAILWAY a loaded wagon from Birmingham to Manchester. I cannot
 COMPANY v. agree with this view. It is obvious that no such contract
 RICHARD was ever intended or authorized by Hudsons' instructions.
 HUDSON That by itself is not conclusive, but what was the contract
 AND made, assuming that it was made by anything more than
 1 SOUS, delivery of the goods themselves and acceptance thereof?
 LIMITED. It must be sought for in the consignment note. Now the
 Lord Dunedin. consignment note begins with the request to the railway
 company to receive and deliver the undermentioned goods,
 and then it specifies the goods—not a loaded truck, but bales
 of cotton identified by certain marks. It specifies the
 consignee, gives the weight, and states that the carriage
 is to be paid by the consignee. The railway company, by
 a marking on the note, acknowledge that the goods are in
 good condition. That document seems to be a clear instruc-
 tion that the goods are handed to the railway company as
 common carriers, and that the consignee is to be debtor
 to the railway company for all expenses in connection with
 carriage. The corresponding invoice is entirely congruous,
 for the railway company affirm that Hudsons are their
 debtors for the total charge for carriage of the bales of cotton.
 Now if by the terms of the contract the railway company
 received the goods as a common carrier, they cannot get
 out of their liabilities by asserting a private arrangement
 between themselves and the consignor of the goods, no
 mention of such arrangement being made to the consignee,
 and on the contrary a demand made as for all services of
 carriage rendered. It is the duty of a common carrier to
 carry the goods in a vehicle fit for the purpose of carrying the
 goods. The goods in question needed some sort of covering
 to protect them from the weather, and it was the duty of the
 carrier to see that they had such covering. I am, therefore,

of opinion that the respondents here are right in suing the appellants, and that the county court judge and Court of Appeal were right in giving judgment in their favour.

I would like to put another test to the opposing view. Supposing Hudsons, the goods being safely carried, had had owed to them a debt by Kynochs. Could they have refused to pay the railway company's account in full in order to have the benefit of a set-off against Kynochs? It would seem absurd to suppose they could, and yet if the railway company's argument is right, I see no answer to such a demand.

I ought to add another remark. Undoubtedly, though a common carrier is an insurer, yet if the damage arises from inherent vice or from bad packing of the goods, the common carrier is not liable. If the improper sheeting could be represented as bad packing, then the railway company might be excused, but I think it is out of the question to so consider it. It is really a part of the vehicle, not of the goods.

Some mention was made of the fourth section of the schedule to the appellant company's Act of 1891. I do not think it has anything to do with the question, for it is obviously inapplicable. The section is dealing with the maxima that may be charged against a trader, and then in the proviso prevents the railway company charging a loading terminal against a trader when the trader has requested the company to do that service himself, and his request has been unwarrantably refused. Here no such request was ever made by Hudsons, and the section could, therefore, have no application, and afforded no justification for Hudsons refusing, if they had been so minded, to pay the total charge.

My Lords, I think these views are, in slightly other words, exactly the views of the county court judge and the Court of Appeal. I confess that, although, as I have already said, in view of the divergence of judicial opinion the case cannot be looked on as easy, I do feel that the judgment will be in accordance with the ordinary commonsense of a commercial community. That an unfortunate consignee of goods who has made no request, except for their being forwarded by the

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANYv.
RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord Dunedin.

H. L. (E.) ordinary means of public transit, should be driven, if his goods are damaged, to seek out some one other than the carrier with whom the carrier has made a private arrangement of which the consignee knows nothing, as to the performance of part of the carrier's service, might be in accordance with law, but would never be accepted by the ordinary public as being in conformity with justice.

1920
LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord Dunedin.

I think that the appeal should be dismissed with costs and I move your Lordships accordingly.

LORD ATKINSON. My Lords, this case is not free from difficulty. It is at common law the duty of a common carrier, such as the appellants, who accepts goods of any particular kind to be carried by him on any particular journey to provide a vehicle or other means of carriage reasonably fit and sufficient to carry them on that journey, having regard to their nature and the character of the transit. It is also his duty at common law to load or stow the goods properly in the vehicle provided so that they may, having similar regard to their nature, and to the risk and dangers attending the transit, be safely carried to their destination. See judgment of Lord Ellenborough in *Lyon v. Mells* (1); *Blower v. Great Western Ry. Co.* (2)

It is clear I think upon the evidence in the present case that all the parties concerned assumed that an open railway truck, that is a truck without a roof, permanent or temporary, which would effectually keep out the rain, was not a fit or proper vehicle for the carriage of the respondents' goods from Birmingham to Manchester in the month of August, 1917. If, therefore, the respondents, or their agents authorized on that behalf, had, in the ordinary course of business, delivered to the appellants at their sheds or stores in Birmingham the respondents' goods to be carried to Manchester and there delivered, and the appellants had accepted the goods for that purpose, it is, I think, clear that the appellants would have been responsible for the damage the goods sustained by reason of the defects in the tarpaulin or sheet with which

(1) (1804) 5 East, 428, 437.

(2) L. R. 7 C. P. 655, 664.

the truck containing them was covered. It was contended, however, as I understood, that the appellants are not responsible for this damage, mainly because of the arrangements which have been made between them and Messrs. Kynochs, Ltd., under s. 4 of the Schedule of Maximum Rates and Charges of the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, and further of the character in which Messrs. Kynochs, Ltd., acted in the matter of the transmission of the goods.

This fourth section of the above-mentioned schedule provides what are the maximum charges which the company can make to a trader for maximum service terminals, which services include loading, unloading, covering and uncovering of merchandise, and all charges for the provision by the company of machinery, plant, stores and sheets. And it further provides that where merchandise conveyed in a separate truck is loaded or unloaded elsewhere than in a shed or building of the company, the latter may not charge a trader service terminals for the performance by the company of any of the above-mentioned services, if the trader has requested the company to allow him to perform those services for himself, and the company have not unreasonably refused to allow him to do so. Messrs. Kynochs, who have large sidings on their own premises, and carry on a very extensive trade, have availed themselves of the privilege conferred by this section. In this instance the appellants supply the truck and sheets needed by Messrs. Kynochs, but they leave to that firm the selection of the truck suitable for any particular kind of goods to be loaded therein and also the loading and covering of the same when loaded, the appellants confining themselves to the haulage of the trucks when loaded from the premises of Messrs. Kynochs to their destination. For the performance of these terminal services the company make to or secure for Messrs. Kynochs payment in this way. They charge the consignee of the goods the full freight, as if they themselves had performed the terminal services as well as done the haulage. I have little doubt that the latter part

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANYv.
RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord Atkinson.

—

H. L. (E.) of this s. 4 was designed and intended to apply to the goods
 1920 of a trader, whether manufacturer or mere distributor, which
 LONDON he desired to have carried by the appellants over some part
 AND of their system. In such a case, of course, if the trader
 NORTH performed those terminal services so negligently that injury
 WESTERN RAILWAY COMPANY thereby resulted to his own goods, he could not (with the
 v. exception hereafter referred to) recover damages from the
 RICHARD HUDSON railway for the consequences of his own neglect, the company
 AND not having been themselves guilty of any negligence:
 SONS, *Talley v. Great Western Ry. Co.* (1); *Barbour v. South Eastern*
 LIMITED. *Ry. Co.* (2) It is not very easy to determine what was the
 Lord Atkinson. true relation in which the company stood to Messrs. Kynochs
 — in the matter of the transmission, under the aforesaid
 arrangement, of their own goods to their consignees. Two
 services were performed for the benefit of the consignees
 and they paid for both. The terminal services were per-
 formed by Messrs. Kynochs for which they were paid a share
 of the aggregate freight, 2s. 3d. per ton. The haulage was
 done by the railway company for which they were paid the
 balance of that freight. Their relation inter se would, as
 regards these transactions, resemble most that of joint
 adventurers, or partners in this business of transmitting
 Messrs. Kynochs' goods to their destination. If so, each
 would be the agent of the other in performing his appropriate
 services, and each would be liable for the acts or defaults of
 the other while performing those services.

After the purchase of these cotton goods by the respondents
 from the Ministry of Munitions, Messrs. Kynochs stood to
 the purchasers in the relation of gratuitous bailees. They
 had the custody of the goods but no right or title to, or
 interest in them. There is no proof that the respondents
 had any notice or knowledge of the arrangement entered
 into between the company and Messrs. Kynochs under s. 4
 of the above-mentioned schedule. Neither is there any evi-
 dence that they ever authorized Messrs. Kynochs to transmit
 to them at Manchester the purchased goods on the terms
 arranged under that section; nor is there any evidence that

(1) (1870) L. R. 6 C. P. 44, 52.

(2) (1876) 34 L. T. 67.

the respondents ever authorized Messrs. Kynochs to deal with the transmission of their goods as if they were their own. The respondents, no doubt, requested Messrs. Kynochs to forward the goods to them to Manchester. That was all. But in the absence of all evidence to the contrary, that, I think, must be taken to mean to forward them, not on the terms of some secret arrangement between Messrs. Kynochs and the company of which they were unaware, but according to the ordinary course of business of the railway company as common carriers, and with all the protection that character afforded. The consignment note of August 21, 1917, and the invoice of the twenty-third of the same month, would not be different in form or contents from what they are, if they had been specially designed to evidence a contract such as, I think, it must be taken the respondents requested Messrs. Kynochs to enter into on their behalf. There is no reference whatever in it to the special arrangement between Messrs. Kynochs and the company, or anything to indicate that the transaction was other than the ordinary transaction entered into by a consignor of goods for the consignee, the freight for all the services, terminal and other, to be paid by the consignee. That was the kind of contract Messrs. Kynochs, the agents of the consignees, were, I think, authorized to make, and, in my view, they, as between the consignees and the railway company, did, in fact, make. No doubt the railway company arranged according to their system of business that Messrs. Kynochs should perform the terminal services with regard to these goods, but that arrangement, I think, no more affects the contract between the railway company and the respondents than if the railway company had sub-contracted with some independent person to perform those terminal services. I think the railway company should be held to have contracted with the consignees to perform with due care, either by their own servants or their agents, all the terminal and other services necessary to carry the respondents' goods from Birmingham to Manchester with safety. They have failed to perform that contract. The terminal services

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY

v.

RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord Atkinson.

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY

v.

RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord Atkinson.

—

were negligently performed by those with whom the company arranged to perform them, in that the goods were inadequately covered, and they are therefore in my view responsible for the damage to the goods caused by that negligence.

There is another question for consideration. Martin B. laid down in *Hart v. Baxendale* (1) that, although a common carrier is an insurer, it is a condition precedent to his liability that goods, if liable to injury unless carefully and properly packed, should be so packed. And in *Sutcliffe v. Great Western Ry. Co.* (2), Kennedy L.J. said that a common carrier may refuse to carry goods which are tendered to him for carriage without such protection as would be necessary to enable the carrier to carry them to their destination with a reasonable prospect of security during the transit. But, though this be so, yet if the imperfect nature of the packing be obvious to the carrier when the goods are tendered for his acceptance, and he receives them without objection, he will not be excused for any damage which may subsequently result from the imperfect packing: *Stuart v. Crawley* (3); *Richardson v. North Eastern Ry. Co.* (4); judgment of Willes J. Again, if the defect in the packing from which damage is likely to occur be discovered on the journey, the carrier should take reasonable means to arrest the loss or deterioration therefrom: *Beck v. Evans.* (5) And if the defect be discovered in time to prevent the forwarding of the goods, they should not be forwarded till the defect has been remedied: *Carr v. London and North Western Ry. Co.* (6)

I am unable to see why the principles laid down in these cases in reference to the defective packing of goods tendered to a carrier to be carried by him should not equally apply to the defective covering of goods packed in a wagon to be hauled by him. In my opinion, the principles do apply; but the difficulty of applying them in the present case arises

(1) 16 L. T. 390.

(2) [1910] 1 K. B. 478, 503.

(3) (1818) 2 Stark. 323.

(4) (1872) L. R. 7 C. P. 75, 82.

(5) (1812) 16 East, 244.

(6) (1875) L. R. 10 C. P. 307.

from the uncertain sense in which the word "obvious" is used. Does it mean easily seen without any careful examination, or discoverable only by such an examination? In my view it is clear that if the covering of the truck in question had a large rent in it (which the servants of the company could easily have seen from the ground if they looked only casually at it) then, though they did not so look, and did not see the rent but sent the truck on its journey the company would be responsible for the injury caused by the rent. But the actual condition of things in the present case is far different from this. The county court judge found that the cover used was full of holes and defective and that the damage which the respondents' goods sustained resulted from those defects. There is no finding that the servants of the company could, by examining the cover from the ground, have detected its defects. The result of the evidence is, I think, this, that the servants of the company could not, without using ladders, get up high enough to examine the cover, when in situ, so as to discover its defects. They did not resort to that expedient. They seem to have left it to Messrs. Kynochs' men to do all that was requisite. It may have been very negligent on the part of the servants of the company not to have made a careful examination of the cover before they sent the truck upon its journey, but I do not think they can be treated as if they had, before they sent it, been actually in possession of the knowledge of the cover's condition which they would have acquired had they made a proper and reasonably careful examination of it. I do not think, therefore, that they can be held liable for the damage to these goods on the principles adopted in *Beck v. Evans* (1) and *Richardson v. North Eastern Ry. Co.* (2) I therefore rest my judgment on the first-mentioned ground.

I think the appeal should be dismissed with costs.

LORD BUCKMASTER. My Lords, the respondents are the plaintiffs in an action brought to recover compensation for

H. L. (E.)
1920
LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED.
Lord Atkinson.

H. L. (E.) 1920
injury caused to their goods during carriage by imperfect protection from the accident of rain.

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.

RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord
Buckmaster.

The goods were undoubtedly damaged in transit, and the damage was due to the imperfect condition of a tarpaulin sheet by which they were covered in the truck. These facts are not in any way in dispute.

The plaintiffs' case rested on two contentions. The first that the appellants, the London and North Western Railway Company, were guilty of a breach of their duties under the contract which they made for the carriage of the goods ; and secondly that they failed in their duty as common carriers. These arguments are not really independent, for the contract contained no limitation of the duties which they owed when as common carriers they took charge of the goods.

The actual contract was made by Messrs. Kynochs. The goods were on their premises when they were bought by the respondents, and, at their request, Messrs. Kynochs entrusted them to the railway company for carriage.

The terms of the contract are evidenced by the consignment note under which the respondents were bound to pay the freight, including the charge for loading and sheeting the goods. This work was however performed by Messrs. Kynochs under a special arrangement which they had made with the railway company ; and it is this circumstance which gives rise to the whole difficulty in the case.

I have been greatly impressed with the argument that, as the negligence alleged was a negligence in the performance of duties for which as between the railway company and Messrs. Kynochs the latter were responsible, and that as the railway company's duties only began after the operation had been completed, the railway company could not be made liable for Messrs. Kynochs' carelessness.

I cannot, however, regard this argument as conclusive. The duties of the railway company, when they accepted the goods, included the provision of all the proper and necessary means of carriage. If the damage had been caused by the breakdown of the truck owing to its unfitness for the

journey the railway company would have been liable, and I see no difference between the carriage on which the goods are placed and the cover by which they are protected.

This case is not in my opinion similar to that of goods imperfectly packed. It is not part of the duties of the railway company to pack goods. They can refuse to carry them if the packing is obviously imperfect, or only consent to carry them at the risk of the owner. But the duty to provide proper protection against wet and proper means of carriage is part of their ordinary duty as carriers from which they cannot escape, except by express contract.

The Court of Appeal appears to have taken the view that Messrs. Kynochs acted as agents for the railway company in loading and sheeting. I am not sure that this is the true position; but there is no difference in the result. If the railway company had contracted with a third party to do the work performed by Messrs. Kynochs, it would have been impossible for them to escape liability; and the only difference in that case would have been that their responsibility would have been assumed to commence from the moment when the goods were delivered to the contractors for the purpose of being placed upon the trucks. It is not, however, to my mind the moment when their responsibility began which is the determining factor in the present dispute. It lies rather in considering what was the true measure of their obligation when they had in fact received and become responsible for the goods. They did not merely undertake for the safe carriage of a loaded and sheeted truck—they undertook for safe carriage of what the truck contained; and, if loss arose owing to imperfection in the carriage or the cover which reasonable care could have avoided, they were responsible.

It is quite true that if the goods had been Messrs. Kynochs' own they would, in the circumstances, have been unable to claim for the loss; and it is pointed out that the railway company could not tell that these goods differed in any way from an ordinary consignment of Messrs. Kynochs' own property; but that argument means no more

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANYv.
RICHARD
HUDSON
AND
SONS,
LIMITED.—
Lord
Buckmaster.

H. L. (E.) than this—that in special circumstances Messrs. Kynochs' relation to the railway company would have prevented them from asserting a claim.

1920
LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED.

In the present case the company undertook to carry for and on behalf of the consignees, who were responsible to them for the total freight, and in the discharge of these duties proper care was not taken to secure the goods against damage which it was the company's duty to prevent. For these reasons this appeal ought, in my opinion, to be dismissed.

Lord
Euckmaster.

LORD PHILLIMORE (read by LORD DUNEDIN). My Lords, the facts in this case are as follows : Messrs. Hudson bought from the Minister of Munitions twenty-seven bales of calico goods which were then lying at the works of Kynochs, Ld., near Birmingham. Messrs. Hudson carried on business at Manchester, and having been evidently put into communication with Kynochs, they requested the latter to forward them to Manchester.

Kynochs have a private siding at Birmingham of very large extent, and out of a number of open trucks which were then upon the siding, and from a number of tarpaulins or sheets also there, they selected a truck and a sheet, neither of them actually belonging to the defendant railway company, but treated as if they were theirs, such things being all pooled during the war, loaded the bales on the truck, covered them with the sheet, and put the truck in position to be hauled by the railway company from the siding and taken by rail to Manchester, and there delivered to Messrs. Hudson. This was accordingly done, but on arrival at Manchester the goods were found to be damaged by water, and the conclusion come to by the learned county court judge who tried the case in the first instance was that the damage was due to the fact of rain coming through the sheet, which was defective and had several holes in it. For this damage, amounting to a sum of 42*l.* and some shillings, Messrs. Hudson brought suit in the county court against the railway company. In that court they recovered judgment. This was reversed by the Divisional Court and restored by the Court of Appeal, and

the railway company have now appealed to your Lordships' House. H. L. (E.)

The defective sheet having been put upon the truck by the servants of Kynochs, when the railway company took delivery, its servants gave a receipt stating that the goods were received in good condition. This was properly held to put the burden upon the railway company of showing that the damage was subsequent, and was not due, to the negligence of its servants while the goods were in the company's charge.

1920
LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord Phillimore.

A question might arise whether the servants of the railway company ought to have discovered the defects before they proceeded to haul the truck away, and to a certain extent this case was made at the trial; but, on the other hand, evidence was given that any examination of this kind would be commercially impracticable; and there was no finding by the county court judge that in this or any other respect there was direct negligence by the servants of the railway company.

The case, therefore, made against the railway company depends upon what may be called their constructive negligence or breach of contract through Kynochs.

Your Lordships have, I think, first to consider the contractual relations of the parties. The first contract arises out of the request by Messrs. Hudson to Kynochs to forward the goods to them. Kynochs accepted the request, and thereby entered into a contract with the railway company. We have not the terms of the actual request or acceptance, but they are not material. There is no dispute about the fact.

Kynochs then applied to the railway company. The document by which they applied is a consignment note in the following terms: "The railway company will please receive and deliver the under-mentioned goods at their respective destinations."

Then follows the number of the truck and the railway company to which it belongs; the number and species of goods described as twenty-seven bales of glazed calico bearing

H. L. (E.) certain marks; the name and address of the consignees,
 1920 Messrs. Hudson, and their address in Manchester, and under
 LONDON the column stating who pays carriage, the word "Forward."

AND When the railway company delivered to Messrs. Hudson,
 NORTH the delivery was accompanied by an invoice making a "Total
 WESTERN to pay" of 3*l.* 0*s.* 10*d.*, and the company collected and
 RAILWAY received that amount.
 COMPANY

v.
 RICHARD
 HUDSON
 AND
 SONS,
 LIMITED.

Lord Phillimore.

The sum is a composite one made up of terminal and hauling charges, and by the "Railway Companies Rates and Charges Confirmation Act": "Where merchandise conveyed in a separate truck is loaded or unloaded elsewhere than in a shed or building of the Company, the Company may not charge to a trader any service terminal for the performance by the Company of any of the said services if the trader has requested the Company to allow him to perform the service for himself and the Company have unreasonably refused to allow him to do so."

It was suggested to your Lordships that Kynochs, not being the actual owners of the bales, were not traders within the meaning of this enactment. I do not think it is necessary that the point should be decided, but it is my impression that Kynochs were traders for this purpose. However this may be, they had in fact an arrangement with the company by which they did render the service of "loading and covering the merchandise," to use the words of an earlier part of the same enactment: "And the Railway Company making one charge to the consignee for the total service, out of it allowed or gave to Kynochs a sum or rebate of 2*s.* 3*d.* per ton." When, therefore, the company collected, it collected partly for itself and partly for Kynochs.

It is not suggested that Messrs. Hudson were aware of this arrangement. They did, however, know before they brought their suit that it was the company's case that the damage resulted through Kynochs covering the goods with an improper sheet (Record, p. 36), and that Kynochs and not the railway company was responsible, and they paid what was in any event due from them and paid no more, because of the arrangement by which the services and the sums paid for

them were divided between the railway company and Kynochs. The authority which Messrs. Hudson gave to Kynochs would have authorized the latter in making a contract with the railway company to contract with it to take the goods from the start and to load and cover as well as carry and deliver. But we must look at the contract which they in fact made, and that, as it appears to me, was a contract to take the goods already loaded and covered. If this be so, there was no breach of contract, and no negligence in the performance of it on the part of the railway company or its servants, and your Lordships were, I think, all of the opinion at the conclusion of the hearing that there was no claim in contract against the railway company, and that the judgment of the Court of Appeal in favour of Messrs. Hudson could not be supported upon this ground, nor upon the ground of estoppel.

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY
v.
RICHARD
HUDSON
AND
SONS,
LIMITED.

Lord Phillimore.

But in the course of the argument a suggestion was made that Messrs. Hudson, as owners of the goods, had a right of action which could be maintained against the railway company as common carriers. I agree that this is so, and further, that, as common carriers, the railway company was responsible for any cause of damage not being the act of God or the King's enemies which arose during the transit.

But if the cause of damage arose before the transit, though the actual damage accrued during the transit, I conceive the law to be otherwise. If, for instance, goods are tendered to the carrier so improperly conditioned or packed that they will heat, spoil or decompose during the ordinary course of the transit and under ordinary conditions, though in fact at the moment of delivery to the carrier they were in good order, the carrier is not responsible for the physical deterioration which actually begins during the transit. This is what is called "vice propre," or proper vice. And for the same reason, if the damage accrues during the transit by reason of the goods being stowed in such a vessel that they leak or percolate or spill in the ordinary course of handling, or if the wrapping be too feeble to protect them in the ordinary course of handling, or while carried in the ordinary way for such goods, the carrier is not responsible.

H. L. (E.)

1920

LONDON
AND
NORTH
WESTERN
RAILWAY
COMPANY

v.

RICHARD
HUDSON
AND
SONS,
LIMITED.Lord Phillimore,
—

Decided cases have given other illustrations of this doctrine. If a horse be of such temper and disposition that it would kick and plunge and cast itself in the ordinary course of railway travelling, or if a dog be sent with a collar so loose that it can slip its head out and run upon the railway line and get killed, the carrier is not responsible.

Applying these principles to the case before us it seems to me, my Lords, what when the railway company, as carriers, received these goods the cause which led to the future damage had already accrued. Nothing more was wanted than the ordinary incident of ordinary rainy weather, and for this the carrier cannot be responsible.

Upon the whole, therefore, my Lords, I am of opinion that this action against the railway company fails, and that this appeal should be allowed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Jan. 30, 1920.

Solicitor for the appellants: *M. C. Tait.*

Solicitors for the respondents: *Radford & Frankland, for Walker, Dean & Co., Manchester.*

[PRIVY COUNCIL.]

J. C.*

1919
Oct. 21.

CRAIG APPELLANT ;
AND
LAMOUREUX RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada (Quebec)—Will—Undue Influence—Husband instrumental in preparing
Wife's Will—Husband sole Beneficiary—Onus of Proof.*

When once it is proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the person who so alleges. That burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the will of the testator ; it must be shown that in the particular case the power has been exercised, and that execution of the will was obtained thereby.

The principles stated above applied in a case arising in Quebec in which a husband, two days before the death of his wife and while she was seriously ill, was instrumental in having prepared, and in obtaining her execution of, a will under which he was the sole beneficiary.

Judgment of the Supreme Court reversed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (February 3, 1914) reversing the judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec (April 22, 1913), which reversed the judgment of the Superior Court of that Province.

The respondent brought an action in the Superior Court to set aside the will of Flore Lamoureux, the wife of the appellant without community of goods, dated July 5, 1911. The testatrix died on July 7, 1911, and on August 3, 1911, the will had been proved in the Superior Court in accordance with Art. 857 of the Civil Code of Quebec. The respondent, an unmarried sister of the testatrix, alleged by her plaint (inter alia) that the will had been procured by the fraud and undue influence of the appellant, and that the testatrix was not physically or mentally capable of making a will.

*Present : VISCOUNT HALDANE, LORD BUCKMASTER, and LORD DUNEDIN.
A. C. 1020. 2 A 3

J. C.

1919

CRAIG

v.

LAMOUR.

EUX.

The facts appear from the judgment of their Lordships. The trial Judge, Bruneau J., set aside the will on the ground that a will which the testatrix signed illegibly shortly before the proved will was executed expressed her true wishes, and that she executed the proved will in consequence of a misrepresentation of law that the illegibility of her signature rendered the earlier will invalid.

The Court of King's Bench (Appeal side) reversed the judgment of Bruneau J. and dismissed the action.

The Supreme Court of Canada, Fitzpatrick C.J. dissenting, reversed the judgment of the King's Bench, and set aside the will. The proceedings in the Supreme Court are reported at 49 Can. S. C. R. 305. The view of the majority of the Court appears from the judgment of their Lordships.

1919. July 29, 31. *G. Lawrence (A. Cinq-Mars K.C. with him)* for the appellant. There was no ground upon which the will could properly be set aside. The Supreme Court erroneously placed the onus upon the appellant. The case was treated as one in which there were circumstances of suspicion, and to which should be applied the principle of *Barry v. Butlin* (1) and *Fulton v. Andrew* (2), followed in *Tyrrell v. Painton*. (3) That principle has no application to a case where a husband, who has lived all his married life with his wife, is instrumental in preparing a will in his own favour under the circumstances of the present case. The doctrine of equity which under certain circumstances places the onus upon a donee, does not apply when the gift is by a will duly executed by a competent testator: *Parfitt v. Lawless*. (4) The respondent accepted the onus at the trial. But in any case the evidence, including the cross-examination of the appellant upon discovery, showed that there was no fraud or impropriety, and that the proved will represented the true intention of the testatrix when she executed it. There was no difference in effect between the illegibly signed draft and the will proved. It is fallacious

(1) (1838) 2 Moo. P. C. 480.

(2) (1875) L. R. 7 H. L. 448.

(3) [1894] P. 151.

(4) (1872) L. R. 2 P. & M. 462.

to say that the testatrix intended to make a will in the terms of that previously signed.

Surveyer K.C. and *J. A. Hurteau* for the respondent. In Quebec the grant of probate is not conclusive of the validity of a will: *Migneault v. Malo* (1); it raises no presumption of validity: *St. George's Society of Montreal v. Nichols*. (2) The proved will did not contain the true will of the testatrix and did not carry out the instructions given by her to the appellant. The evidence shows that her intention was to make a will containing the clause included in the illegibly signed will but not included in the proved will. The words of recommendation in the suppressed clause would in Quebec have a testamentary effect. The appellant being the sole beneficiary under the will the onus was upon him to establish that it was not procured by undue influence: *Barry v. Butlin* (3), *Brown v. Fisher* (4). That onus was not discharged. Art. 756 of the Civil Code defines a will as an act by which a testator makes a free disposal of his property "without the intervention of the person benefited." [Arts. 1238 et seq., "Of presumptions," were also referred to.] The evidence shows that the document now in question was obtained by the appellant's undue influence, and his false representation that the will already signed was of no effect. At the time that the proved will was executed the testatrix was not physically or mentally capable of making a will.

J. C.

1919

—
CRAIG
v.
LAMOUR-
EUX.

Oct. 21. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from the Supreme Court of Canada, which reversed, the Chief Justice dissenting, a judgment of the Court of King's Bench for the Province of Quebec. That Court, in its turn, had reversed the judgment of the Superior Court for the Province, delivered in an action which was brought to set aside a will. The claim was made against the appellant as defendant, and was based on the contention that as the appellant, who was the husband of the

(1) (1872) L. R. 4 P. C. 123, 139, 140.

(2) (1894) Q. R. 5 S. C. 273.

(3) 2 Moo. P.C. 480.

(4) (1890) 63 L. T. 465.

J. C.
1919
CRAIG
v.
LAMOUR-
EUX.

testatrix, was the sole beneficiary under the will and had been instrumental in preparing it, the onus lay on him to show that he had not procured its execution by undue influence and misrepresentation, and that this onus he had failed to discharge.

Their Lordships feel bound to express their regret at the course which the litigation has taken. The amount of the testatrix's estate is small, and the costs of determining the issue raised must be out of all reasonable proportion to the sum at stake. But the judgments given have been successively reversed and there is no course open to this Board but to deal with the matter without regard to consequences.

The respondent, the plaintiff, was an unmarried sister of the testatrix. The latter had been married to the appellant for twenty-four years, and the husband and wife had lived together through that period in the house of the appellant's father near Montreal. They were married with a contract providing for separation of property, under which the surviving spouse would not on intestacy take any interest in the property of the predeceasing spouse, a situation which they had, according to the evidence, only realized immediately before the death of the wife.

The events which have given rise to the controversy between the parties are shortly as follows: The testatrix was seized with a serious illness on Saturday, July 1, 1911. Doctors who were called in thought her condition one of danger. The trained nurse, who was in attendance, finally suggested to the testatrix that she should see the parish priest, and he was summoned accordingly by the husband's father, Joseph Craig. The latter had heard the appellant and the testatrix talking with the idea that the survivor of them would succeed to the property of the other, and having doubts whether they realized that, from the nature of their marriage contract, this could not be without a will, he spoke first to his son, and then to the priest. The priest, after administering the rites of his Church to the testatrix, mentioned the point to her, but, according to his evidence, without suggesting that she should leave her property to her husband. When the priest had left her, the testatrix

told the nurse to ask her husband to come to her room, as she had something to say to him. He came, and the nurse left the room. According to the husband's testimony, his wife asked him how it was that their affairs were not in order as she had always been told by him, and she requested him to get them arranged so that, as they had always agreed when she was in health, the property should go to the survivor. The husband then went to his brother, who lived in the house, and who was a lawyer. The latter wrote out a will in the following words: "Par mesure de prudence, et sans me croire nullement dangereusement malade, je prends à tout évènement les présentes dispositions: Je donne et lègue, sans restrictions, à mon époux, Isaie Craig, tous mes biens tant immeubles que meubles, sauf les cadeaux qu'il jugera à propos de faire à mes proches comme souvenirs."

The husband read this will to his wife, who asked him, according to his account, if he could do something for her own family, for her father had always asked her to think of these others if it was at all possible, as far as she would like to do so, and she said to him that she would like that he should do this if he could. The husband then went back to his brother and asked him to add a clause to the will. The brother redrew it in the old terms, but with the following addition at the end: "Suivant les recommandations de mon défunt père, je lui recommande de même de ne donner ou léguer ces dits biens à nuls autres qu'aux membres de ma famille."

The husband and wife had had no children, and the wife's legal heiresses, apart from the operation of the will, were the respondent and her sister. She had inherited a substantial amount of property from her deceased father. What has been stated appears to their Lordships to represent the substance of what was proved by the witnesses on balance of testimony.

The wife was asleep after an injection of morphine when this second document was prepared. It was taken to her by her husband later on, between five and six o'clock in the afternoon of the same day (Wednesday, July 5), and was read over to her by the husband. She tried to sign her name to it,

J. C.
1919
CRAIG
v.
LAMOUR-
EUX.

J. C.
1919
CRAIG
v.
LAMOUR
EUX.

but the signature was illegible. The document was subsequently signed by three witnesses whose names appear on it, but as they did not sign in the presence of the testatrix, as required by the law, the execution was apparently invalid. It is not, however, necessary to go into this question, because when it was shown to the brother he pronounced this will valueless because of the illegible character of the signature, and it was in consequence superseded. The husband, who says he was under the impression that this was so, informed his wife of it. She then, according to him, asked him to bring her the first will which he had read over to her in the morning. According to the testimony of Madame Amyot, an intimate friend of the wife who was with her, there elapsed only a brief interval between the signature of the second will and the signature of that first prepared and for which she had finally asked. Madame Amyot says that the husband offered to read it over again to her, and that she said that she did not desire this to be done, adding that it was not necessary, for she was going to sign it at once. This she did by putting her mark in the form of a cross. At the end of this will the words had been added to this will: "Et je déclare ne pouvoir signer"; the cross was marked underneath, and three witnesses attested the document in the testatrix's presence as being so executed. Their Lordships think that no question can be successfully raised as to the validity of this will so far as formalities are concerned. Nor do they think that it was shown that the testatrix was otherwise than capable of understanding what she did. The evidence of the nurse, who was one of the three attesting witnesses, supports this view. Miss Craig, a lady of mature age, who was also present when the testatrix put her mark to the will, and was one of the witnesses, says that the testatrix asked for her spectacles, and that she was in full possession of her faculties. The doctor, who had seen her twice that day, was not called to contradict this. The action was tried before Bruneau J. without a jury. The learned judge found against the first will, that finally signed with a cross. He held that the true intention of the testatrix was expressed in the other or second will, which had been put aside on the

representation that it was inoperative because of the illegible signature, and that she was led to sign her first will only because of this misrepresentation of the law.

The husband appealed to the Court of King's Bench, where judgment was given by Chief Justice Archambeault, on behalf of himself and Lavergne, Cross, Carroll and Gervais JJ. The judgment of Bruneau J. was reversed, and the action dismissed for reasons given very fully by the learned Chief Justice. In his judgment he makes a close examination of the evidence. With his conclusions as to what really happened their Lordships are entirely in agreement, and to the reasons he gives for rejecting the conclusion come to by Bruneau J. they have little to add. The Chief Justice points out the fallacious character of the argument that because of the departure from the second will being based on a mistaken idea about the law relative to the illegibility of the signature, the will signed in its place was therefore bad. For whether or not the testatrix was misled by this idea, she knew what she was doing when she finally signed her mark to the first will. She did not ask that it should be altered. She adopted it as it stood. Moreover, as the learned Chief Justice points out, if she had not done so she might have died intestate, inasmuch as the second will was not validly attested by the witnesses, and she would have defeated her purpose, which was that her surviving husband should take her property. The judgment does not proceed on presumptions of law. It simply weighs the evidence apart from such presumptions, and arrives at the conclusion that so regarded the plaintiff had failed to make out any case for upsetting a will which the testatrix must have taken to have elected to make with full consciousness of what she was doing.

The plaintiff appealed to the Supreme Court of Canada, where, unfortunately as their Lordships think, the majority of the learned judges, notwithstanding the dissent of the Chief Justice there, were much influenced by the view that the validity of the will in such a case as the present depended on whether the husband had discharged a burden which they held to be on him of proving that his wife, in making a will in his favour, had such complete appreciation of the consequences

J. C.

1919

CRAIG

v.

LAMOUR-

EUX.

J. C.
1919
CRAIG
v.
LAMOUR
EUX.

of her action as probably nothing short of independent advice could have given her. They applied what they took to be a principle of universal application, that a person who is instrumental in framing a will under which he obtains a bounty is placed in a different position in law from ordinary legatees who are not called on to support by evidence of its honourable and clearly comprehended character the transaction as regards their legacies. In their case they thought that it is enough that the will should be read over to the testator, and that he should be of sound mind and capable of understanding it. But they considered that there was a further burden resting on those who take for their own benefit after having been instrumental in framing or obtaining the will. For they have thrown on them the burden of proving the righteousness of the transaction. This they considered that the husband had not done in the present case, and in the light of the principle so laid down they reviewed the evidence and decided against the will.

No doubt a principle such as that relied on by the majority of the learned judges in the Supreme Court of Canada is one which is very readily applied in cases of gifts inter vivos. But, as Lord Penzance pointed out in *Parfitt v. Lawless* (1), it is otherwise in cases of wills: When once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this. It may well be that in the case of a law agent, or of a stranger who is in a confidential position, the Courts will scan the evidence of independent volition closely, in order to be sure that there has been thorough understanding of consequences by the testator whose will has been prepared for him. But even in such an instance a will, which merely regulates succession after death, is very different from a gift inter vivos, which strips the donor of his property during his lifetime. And the Courts have in consequence never given to the principle to which the learned judges refer the sweeping application which they have made of

(1) L. R. 2 P. & D. 462.

it in the present case. There is no reason why a husband or a parent, on whose part it is natural that he should do so, may not put his claims before a wife or a child and ask for their recognition, provided the person making the will knows what is being done. The persuasion must of course stop short of coercion, and the testamentary disposition must be made with comprehension of what is being done. X

X As was said in the House of Lords when *Boyse v. Rossborough* (1) was decided, in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean. And the relationship of marriage is one where it is, generally speaking, impossible to ascertain how matters have stood in that regard. X

It is also important in this connection to bear in mind what was laid down by Sir James Hannen in *Wingrove v. Wingrove* (2) and quoted with approval by Lord Macnaghten in delivering the judgment of this board in *Baudains v. Richardson* (3), that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained.

Their Lordships are of opinion that the majority in the Supreme Court did not sufficiently bear in mind what is the true principle in considering the evidence in the present case. They appear to have applied another principle which was not relevant in the inquiry, and to have thrown a burden of proof on the appellant which was not one which he was called

J. C.
1919
CRAIG
v.
LAMOUR-
EUX.

(1) (1856) 6 H. L. C. 2, 49.

(2) (1885) 11 P. D. 81.

(3) [1906] A. C. 169.

J. C. upon to sustain. Their Lordships agree with the course
1919 taken and the conclusions come to as the result in the judgment
CRAIG of the Court of King's Bench. They think that the judgment
v. under appeal must be reversed, and that the respondent
LAMOUR- must bear the costs here, and in the Courts below of an
EUX. action which was misconceived. They will humbly advise
His Majesty accordingly.

Solicitors for appellant : *Blake & Redden.*

Solicitors for respondent : *Lawrence Jones & Co.*

Distinguished. Re BARNATO (decd.).
[1949] 1 All E.R. 515.

[PRIVY COUNCIL.]

Distinguished. Re
BARNATO.
[1949] 1 Ch. 258

J. C.* ESQUIMALT AND NANAIMO RAILWAY }
1919 COMPANY } APPELLANTS ;
Oct. 23. AND
WILSON AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Procedure—Parties—Attorney-General—Joinder as a Defendant—Action which may affect Crown Right.

When an action, if successful, will affect rights claimed by the Crown but the plaintiff has against the Crown no claim to which the procedure by petition of right is applicable, the Attorney-General is a necessary and proper party and may be joined as a defendant by the plaintiff.

In 1887 the Crown, in the right of the Dominion of Canada, granted land in British Columbia to the appellants, who afterwards conveyed to the respondents the surface rights in part of the land reserving certain rights of easement. In 1918 the Crown, acting under a statute of British Columbia, purported to grant to the respondents the fee simple in that part of the land reserving to the Crown rights which conflicted with those which remained in the appellants under the grant of 1887. The appellants thereupon brought against the respondents an action for a declaration that the Crown grant to the respondents was invalid so far as it interfered with those rights :—

Held, that the appellants were entitled to an order joining the Attorney-General for the Province as a defendant to the action.

Decision of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal (April 1, 1919)

Present : THE LORD CHANCELLOR, VISCOUNT HALDANE, LORD BUCKMASTER, LORD ATKINSON, and Mr. JUSTICE DUFF.

reversing an order of Macdonald J. so far as it ordered that the Attorney-General for British Columbia should be added as a defendant in actions brought by the appellants against the respondents in the Supreme Court of that Province.

The circumstances of the case appear from the judgment of their Lordships.

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

1919. July 15, 17. *E. P. Davis K.C., Hon. M. Macnaghten K.C., and H. B. Robertson* for the appellants. The Attorney-General is a necessary and proper party to the action, since the appellants are attacking the validity of a Crown grant, and especially since if the action succeeds the rights reserved by the Crown in the grant to the respondents will cease. "The Attorney-General, or other proper officer of the Crown, is always made a party in any cause in Chancery, etc., in which the King's rights are or may be called in question": Chitty's Prerogative of the Crown, 1820, p. 244. The Crown being indirectly affected an action against the Attorney-General can be maintained: *Hodge v. Attorney-General* (1); *Dyson v. Attorney-General*. (2) The procedure by petition of right is not applicable, since the appellants are claiming no property from the Crown; the rights which they seek to protect are already vested in them by the Crown. Further, the effect of the disallowance of the statute under which the grant to the respondents was made will come in question; that in itself is a sufficient reason why the Attorney-General should be made a party.

S. S. Taylor K.C. for the respondents. The Attorney-General is not a necessary party to the present litigation. If the parties wish to obtain a decision binding upon the Crown they must proceed by petition of right. According to the practice in England the Attorney-General as representing the Crown could only be made a defendant in the Exchequer Court, and under the equitable jurisdiction of that Court; the jurisdiction was based upon the statute 33 Hen. 8, c. 39. *Hodge v. Attorney-General* (1) was a case of that character,

(1) (1839) 3 Y. & C. 342.

(2) [1911] 1 K. B. 410, 421.

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

so also was every case relied on in *Dyson v. Attorney-General*. (1)
But the effect of 5 Vict. c. 5 was to take away the equitable
jurisdiction of the Exchequer Court save in revenue cases:
Attorney-General v. Halling (2).

[LORD BUCKMASTER referred to *Ellis v. Duke of Bedford*. (3)]

The objection was not taken in that case. Further, the
appellants cannot sue the Attorney-General if they could have
proceeded by petition of right : *Eastern Trust Co. v. McKenzie,
Mann & Co.* (4) The appellants could have so proceeded.
The position is similar to that in *Taylor v. Attorney-General* (5),
which was a petition of right. Under s. 7 of the Crown Pro-
cedure Act (R. S. B. C. 1911, c. 63) a subject can in British
Columbia be made a co-defendant in a petition of right. The
definition of "relief" in s. 2 of that Act is very wide. The
disallowance of the statute may have been a ground for giving
the Attorney-General notice of the action but was not a
ground for joining him.

Oct. 23. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The question that is raised by this
appeal is a question of procedure, technical in its nature, but
doubtless of great importance both to the appellants and the
respondents. It is simply whether the Attorney-General can
and ought to be added as defendant to proceedings in which
the appellants are plaintiffs and the respondents are the
defendants. Although the merits of the action are in no way
involved in the determination of this point, it is necessary that
the facts should be stated in order that it may be clearly
understood in what capacity and for what purpose it is
sought that the Attorney-General should be brought before
the Court.

On April 21, 1887, the Crown, in the right of the Dominion
of Canada, granted to the appellants, a railway company duly
incorporated, and having its head office in Victoria, British

(1) [1911] 1 K. B. 410.

(2) (1846) 15 M. & W. 687.

(3) [1899] 1 Ch. 494.

(4) [1915] A. C. 750, 759.

(5) (1837) 8 Sim. 413.

Columbia, the fee simple of a large tract of land in the island of Vancouver. On December 24, 1890, the company granted the surface rights of part of this land to Joseph Ganner. On January 26, 1904, Ganner died, and the respondents in the first appeal are his executors and trustees. Joseph Ganner was one of the original settlers upon the island, and accordingly his representatives became entitled to the benefit of the provisions of the Vancouver Island Settlers' Rights Act, c. 54 of the British Columbia Statutes, 1903-4, which received the Royal Assent on February 10, 1904.

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

Sect. 3 of that statute is in the following terms: "Upon application being made to the Lieutenant-Governor-in-Council within twelve months from the coming into force of this Act, showing that any settler occupied or improved land within said railway land belt prior to the enactment of chapter 14 of 47 Victoria, with the bona fide intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him, or his legal representative, free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler."

Many of the settlers, and among them the representatives of Joseph Ganner, failed to avail themselves of the rights conferred by this statute within the time thereby limited, and the rights conferred would consequently have lapsed but for another statute of the Province of British Columbia passed on May 19, 1917, called the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, which provided that the Act of 1904 should be amended by striking out the words "within twelve months of the coming into force of this Act" and inserting in lieu thereof "on or before the 1st day of September, 1917."

Pursuant to the power so obtained, the respondents, as executors and trustees under the will of Joseph Ganner, applied for the Crown grant and obtained the same on February 15, 1918, such grant carrying with it the coal rights under the surface. To ascertain the effect of this grant it is necessary

J. C.
1919
Esquimalt
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

to examine the provisions of "the Land Act in force at the time when the said land was first so occupied or improved by the said settler." This was the Land Act of 1875, and by its provisions the grant conveyed the fee simple of the land to the settler or his representatives, according to a form known as Form 9, which contained important reservations in favour of the Crown. These reservations are as follows: "(a) The right to 'resume any part of the said lands for making roads, canals, bridges, towing paths or other works of public utility or convenience.' (b) The right to 'enter into and upon any part of the said lands, and to raise and get thereout any gold or silver ore which may be thereupon or thereunder situate, and to use and enjoy any and every part of the same land.' (c) The right to authorize any person 'to take and occupy such water privileges and such rights of carrying water over any parts of the lands for mining or agricultural purposes.' (d) The right to authorize any person 'to take from or upon any such land, without compensation, any gravel, sand, stone, lime, timber or other material, which may be required in the construction, maintenance or repair of any roads, ferries, bridges or other public works.'"

The effect of the legislation and the effect of the grant, therefore, if nothing more had happened, would have been to defeat the grant previously made by the Crown in favour of the appellants, and to reserve to the Crown certain rights which they could not possess if the grant to the appellants were undisturbed. The appellants allege that the grant to the representatives of Joseph Ganner was inoperative, and instituted the proceedings out of which the first appeal has arisen for the purpose of raising and testing that question.

The action, as originally framed, claimed a declaration that the Crown grant was null and void so far as it purported to grant to: "(a) The coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances in, upon or under the said lands; (b) That part of the surface of said lands to which or upon which the plaintiff is entitled to exercise acts of ownership, purchase or rights of easement"; and sought for an injunction to restrain the defendants from working the coal

and from attempting to register a title. There was an alternative claim that the grant was null and void in a certain and more limited aspect. In the first instance the plaintiffs based their claim upon the ground that the hearing, which they allege was necessary under s. 3 of the Act of 1904, was improperly held, or, in fact, was never held at all. The defendants, among many other defences, objected that the Crown grant could only be impeached in an action to which the Crown was a party.

After the issue of the writ a petition was presented for disallowance of the statute of 1917, and it was disallowed by the Governor-General in Council on May 30, 1918. On June 7, 1918, application was made by the plaintiffs asking that the Attorney-General for the Province of British Columbia might be added as a defendant to the action, and that certain amendments should be made in the statement of claim, the most important being that the statute of 1917 had been disallowed. Macdonald J., before whom the case was heard, granted the relief sought, but the Court of Appeal overruled his judgment so far as the addition of the Attorney-General was concerned, and from that judgment these appeals have been brought.

The respondents put forward three grounds on which they say the appeals should fail. First, that there is no need to make the Attorney-General a party. Secondly, if his presence is necessary, a petition of right is, in the circumstances, the only means by which it can be secured; and, thirdly, that if a petition of right is not applicable, the case does not lie within the ambit of the cases where the Attorney-General can be brought before the Court by any means.

With regard to the first of these contentions, their Lordships are clearly of opinion that the Attorney-General ought to be before the Court. It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but in the event of the plaintiffs' success, the rights existing in the Crown and consequent upon the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as defendant, and that is the best means of testing the

J. C.

1919

ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

necessity of the attendance of the Crown. The learned judges of the Court of Appeal, from whose judgment their Lordships feel compelled to differ upon this point, do not refer to the rights of the Crown which may be affected, but base their opinion solely on the ground that the Crown is not affected by the result, and that consequently a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with this conclusion.

It may further be added that an argument that the Crown ought not to be introduced into the litigation lies strangely upon the lips of the respondents, whose definite assertion that the Crown was a necessary party was the real origin of the application that the Attorney-General should be joined.

With regard to the second point, in their Lordships' opinion this is not a case to which procedure by petition of right is properly applicable. That procedure is adopted for the recovery from the Crown of property to which the applicant has a legal or equitable right, as, for example, by proceedings equivalent to an action of ejectment or the payment of money. In Blackstone's Commentaries, Stewart's edition (1841), Book III., pp. 275-6, it is said that petition of right is of use where the Crown is in full possession of any hereditaments or chattels and the petitioner suggests such a right as controverting the title of the Crown. In the Province of British Columbia the proceeding is regulated by the Crown Procedure Act of 1897 (R. S. B. C. 1911, c. 63). An examination of this will, in their Lordships' opinion, shows that procedure by petition of right is inapplicable. In that statute the "relief" is defined as a species of relief claimed or prayed for in any petition of right, whether a restitution of any corporal right or a return of lands or chattels or a payment of money or damages or otherwise, following the old principles by which a petition of right has always been regulated. Sect. 7 shows that where a petition of right is presented to recover real or personal estate or any right granted away or disposed of on behalf of His Majesty, a copy is to be left at the house of the person last in possession, showing that the main claim is against

the Crown, that the person last in possession is not necessarily a proper party to the suit, but that, in order that he may be affected with knowledge, provision is made that he should be served in the manner indicated.

Now if the plaintiffs were to succeed in this case, no order would be made requiring the Crown to do any act at all. It is due to the peculiar circumstances in which the legislation relating to these lands stands that, if the Crown's grant to the respondents be void, the appellants' estate is complete. All that the Crown could do to perfect the appellants' title has already been done, and it is only through the indirect operation of the grant by the Crown to the settlers that any interest arises in the Crown at all. If the grant fail, the interest fails with it. It may indeed be open to argument that the reservations in favour of the Crown cannot be operative where the Crown has already made a grant from which such reservation would derogate. This question was not, however, raised before their Lordships, and they express no opinion upon it.

There remains the consideration of the question upon which much learned argument has been addressed to their Lordships. It is asserted on behalf of the respondents that : " There is no instance of any action in the Court of Chancery or any other Court, save the old Court of Exchequer, where the Crown represented by the Attorney-General has ever been defendant, except as a consequence of a petition of right after granting a fiat," and the jurisdiction of the Court of Exchequer is alleged to be due to the application of the statute of 33 Hen. 8, c. 39.

Their Lordships cannot accept this contention. The reference to proceedings in Chancery under a fiat confuses two separate methods of procedure. It is, of course, true that proceedings in the Court of Chancery covering such a claim as would properly be the subject of petition of right cannot be brought except either by the direct medium of such proceedings or by first asking for a fiat that proceedings might be instituted in Chancery ; and the case of *Ryves v. Duke of Wellington* (1) is an illustration of this fact. But there are many cases in which petition of right is not applicable in which the Crown

J. C.

1919

ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

(1) (1846) 9 Beav. 579.

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON,
—

was brought before the Court of Chancery, and the Attorney-General, as representing the interests of the Crown, made defendant to an action in which the interests of the Crown were concerned, apart altogether from the provisions of the statute of Henry VIII. One of the earliest of such cases was *Pawlett v. Attorney-General*. (1) In that case the plaintiff had executed a mortgage in favour of a mortgagee; the mortgagee had died, and his heir, being attainted of high treason, the King had seized the lands. The plaintiff thereupon exhibited a bill against the King and the executor, seeking redemption of the mortgage, and the question that arose was whether he could have any remedy against the King for redemption. It was said that he could not, but that he must prefer a petition of grace and favour. It was decided by Lord Hale and Baron Atkyns that the proceedings would lie, and though Lord Hale gave as one of his reasons the consideration of the statute of 33 Hen. 8, c. 39, Baron Atkyns based his judgment on a far broader basis. It was stated in the report that he was strongly of opinion that the party ought in this case to be relieved against the King, because the King was the fountain and head of justice and equity, and it was not to be presumed that he would be defective in either, and it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him—a ground of decision which has no relation whatever to the statute of 33 Hen. 8, but is based on general principles. In *Barclay v. Russell* (2) the Attorney-General having been made a party to a suit, application was made before Lord Thurlow asking that he might be directed to appear. This, in accordance with practice, he declined to order; but his Lordship asked, when the Attorney-General on behalf of the Crown was a necessary defendant, whether he was served with a subpœna, pointing clearly to the view that the Attorney-General was regarded as being a proper party to proceedings in equity; and *Perkins v. Bradley* (3) is another instance of such a case. But it is unnecessary to pursue this matter,

(1) (1668) *Hardres*, 465.

(2) (1797) 3 *Ves.* 424.

(3) (1842) 1 *Hare*, 219.

for in *Deare v. Attorney-General* (1), a case on the equity side of the Court of Exchequer, where a bill was brought to obtain discovery against the Attorney-General, the question was examined in some detail by Lord Lyndhurst, then Lord Chief Baron. He stated this: "I apprehend that the Crown always appears by the Attorney-General in a Court of Justice, especially in a Court of Equity, where the interest of the Crown is concerned. Therefore, a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned." This statement, though made on the equity side of the Court of Exchequer, is certainly not limited to the Chancery proceedings that were instituted in that Court; it is of wide and general application. It is in entire agreement with the principles enunciated by Baron Atkins in the earlier authority, and it is recognized as being the existing practice in Courts to-day.

It may be mentioned that in *Ellis v. Duke of Bedford* (2), where the Court of Appeal thought that the rights of the public were involved in the appeal, and that consequently the Crown ought to be represented, judges of such wide experience as Lindley M.R. and Rigby L.J. directed that the case should be amended by the addition of the Attorney-General as defendant. The House of Lords (3) thought the amendment unnecessary, but no one questioned that if necessary it could be made. Apart also from statute, the Attorney-General is always added as defendant in Chancery proceedings where his presence is necessary on behalf of charities, and their Lordships have not heard of any objection having been taken at any time to his introduction as a defendant in suits so brought.

It does not follow from this that procedure by petition of right is in any way infringed. In proceedings for which a petition of right is the proper course, the Courts, as already pointed out, would undoubtedly decline to entertain an action brought against the Attorney-General in the ordinary way; and indeed it was this very practice that led to the dispute in the case of *Dyson v. Attorney-General*. (4) In that case there

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

(1) (1835) 1 Y. & C. 197, 208.

(2) [1899] 1 Ch. 494.

(3) [1901] A. C. 1.

(4) [1911] 1 K. B. 410.

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.
—

was no defendant except the Attorney-General, and the claim was for nothing but the declaration that the plaintiff was under no obligation to comply with the provisions of a notice issued by the Commissioners of Inland Revenue on behalf of the Crown. It was there contended that the authorities referred to had no application except in cases in which the rights of the Crown are only incidentally concerned. In all cases where the rights of the Crown are the immediate and sole object of the suit, it was urged that the application must be by petition of right. The question now urged as to the jurisdiction in the Court of Exchequer was raised then before the Court of Appeal, but the Master of the Rolls points out (1) that the equity jurisdiction of the Court of Exchequer on the Revenue side had nothing peculiar as distinguished from the Court of Chancery. Their Lordships are of opinion that in making that statement the learned Master of the Rolls was perfectly accurate, and it is unnecessary to consider, and their Lordships pass no opinion upon, whether or no the case of *Dyson v. Attorney-General* (2) was in other respects properly decided.

Turning back once more to the present case, the claim sought is a declaration not against the Crown, but against grantees from the Crown. If the relief be granted and if the injunction sought be made, there will be nothing directing the Crown to do any act whatever. It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with. But in order to see whether this involves a direct claim against the Crown, it is necessary to see how those rights arose. The position is certainly strange. The original grant by the Crown to the appellants is perfectly good and remains unassailed except to the extent to which it may be defeated by application made by the settlers. If such application be made and granted, there is then reserved to the Crown out of the grant certain powers and rights against the grantee which they would not otherwise possess. In the event of the grant being good, these rights arise; if the grant be bad, they fall with it. But the chief substance of the action

(1) [1911] 1 K. B. 416.

(2) *Ibid.* 410.

is the declaration that the grant is void, and the other result is consequential upon that decree.

Their Lordships therefore think that the Crown is affected in this matter, so that the presence of the Attorney-General is proper and necessary for the determination of justice. The conclusion arrived at by their Lordships, though at variance with that of the Court of Appeal, does not, as it appears to them, conflict with the view entertained by the learned judges of the law, but depends entirely on the interpretation which they place on the rights which the Crown possesses unless the grant is overthrown, and this consideration does not appear to have been present to those learned judges' minds.

In the result, therefore, they think the appeal succeeds, and they will humbly advise His Majesty that the judgment of Macdonald J. be restored, and that the costs of the appellants here and in the Court of Appeal be paid by the respondents.

Solicitor for appellants : *Linklater & Co.*

Solicitors for respondents : *White & Leonard.*

J. C.
1919
ESQUIMALT
AND
NANAIMO
RAILWAY
COMPANY
v.
WILSON.

[PRIVY COUNCIL.]

CHEANG THYE PHIN AND OTHERS . . APPELLANTS ;
AND
TAN AH LOY (SINCE DECEASED) RESPONDENT.

J. C.*
1919
Nov. 25.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS
SETTLEMENTS (SETTLEMENT OF PENANG).

*Straits Settlements (Penang)—Marriage Law—Chinese Resident—Secondary
Wife—Absence of Ceremony.*

According to the Chinese law of marriage, which is applied in Penang in the case of Chinese residents, a Chinaman may have secondary wives (sometimes called "t'sips") who have the status of wives and whose children are legitimate. Although some sort of ceremony is usual when a "t'sip" is taken, proof of the performance of a ceremony is not essential to establish the relationship.

The deceased respondent for twenty-six years lived and was main-

* *Present*: VISCOUNT FINLAY, LORD PARMOOR, and THE LORD JUSTICE CLERK.

J. C.
1919
CHEANG
THYE
PHIN
v.
TAN
AH
LOY.

tained in the house of a Chinese merchant in Penang, and bore him children. One child who survived the father was referred to in his will as "my daughter," and her name appeared upon his tombstone. The respondent had been recognized by the Chinaman and by his primary wife as occupying in his household the position of a secondary wife :—

Held, that the deceased respondent was a secondary wife, whether or not the performance of a ceremony was proved, and that under the practice in Penang (which was not questioned in the appeal) she was entitled, upon the death of the Chinaman partially intestate, to share as a widow.

APPEAL from an order of the Supreme Court of the Straits Settlements (Settlement of Penang), dated August 25, 1916, reversing an order of Sproule J. which confirmed, with a variation, a certificate of the Registrar.

The appeal related to the estate of Cheang Ah Quee, a Chinese merchant who resided at Penang and died there in 1901, possessed of considerable property in Penang and elsewhere, and leaving a will dated July 7, 1894. Upon an originating summons taken out by the first appellant, one of the trustees and executors of the will, the Supreme Court on appeal held, *inter alia*, that there was an intestacy as to part of the property ; in pursuance of that judgment, the Registrar was directed to hold an inquiry to ascertain who were the next of kin of the testator living at his death.

By the letters patent of 1855 the Courts of the colony have and exercise jurisdiction as an Ecclesiastical Court, so far as the several religious manners and customs of the inhabitants of the colony permit. The practice that has been adopted by the Courts of the Straits Settlements with reference to the devolution of the estate of a deceased Chinese on an intestacy has been to assign the one-third share of the widow under the Statutes of Distributions to such persons as in the judgment of the Courts have established their claim to be considered as widows of the deceased and to distribute the remaining two-thirds among all the children of such women as are proved to have married the deceased. The Courts of the Straits Settlements in adopting this practice have taken the view that more than one woman might be married at the same time to a Chinese man.

Upon the inquiry evidence was received in respect of the claims of five Chinese women, including the respondent Tan Ah Loy, each of whom, it was alleged, had been lawfully married to the testator according to Chinese law. The Registrar by his certificate rejected the claim of Tan Ah Loy, who, together with her daughter, Cheang Ah Soo, applied to the Supreme Court to discharge or vary the certificate. The application was heard by Sproule J. and the certificate confirmed so far as it rejected the respondent's claim. The certificate, as varied by an amendment not material to this appeal, declared that "Lim Ah Chen and Tan Gek Im are the only lawful wives of Cheang Ah Quee who survived him, and are entitled to one-third of the property in question." The respondent Tan Ah Loy and her daughter, Cheang Ah Soo, appealed to the Supreme Court, appellate jurisdiction; the respondent's daughter died before the hearing.

The appellate Court (Bucknill C.J., Ebdon and Earnshaw JJ.), on August 25, 1916, allowed the appeal and declared that the respondent was a lawful wife of Cheang Ah Quee, and that Cheang Ah Soo was one of his next of kin.

The facts of the case and the grounds of the decisions of the Registrar, and of the Supreme Court upon the appeal, appear from the judgment of their Lordships. Sproule J. gave no reasons for his decision.

Tan Ah Loy died in October, 1918, and by an Order in Council Hafiz Ghulam Sarwar, Registrar of the Supreme Court, having been appointed to represent her in the present appeal, was substituted as respondent.

1919. Oct. 24, 27, 28. *Upjohn K.C.* and *A. M. Latter* (with them *Sir J. Bromhead Matthews*) for the appellants. The evidence did not establish that the deceased respondent was a secondary wife as distinguished from a mistress. The onus was upon her to show that the testator intended to enter into a matrimonial relationship. Even if the performance of a ceremony is not essential, there must, according to Chinese law and custom, be recognition of a status superior to that of a mistress. The evidence did not

J. C.
1919
CHEANG
THYE
PHIN
v.
TAN
AH
LOY.

J. C.
1919
CHEANG
THYE
PHIN
v.
TAN
AH
LOY.
—

show that the respondent was so recognized. The language of the testator's will shows that he regarded the two women whom he named as "wives," as being his only wives. [Reference was made to *Choo Eng Choon v. Neo Chan Neo* (known as the *Six Widows' Case* (1)); *Ngai Lan Shia v. Low Chee Neo* (2); *Yeap Cheah Neo v. Ong Cheng Neo* (3); *Ma Wun Di v. Ma Kin.* (4)]

Sir Erle Richards K.C., Arthur Page and Roland Braddell for the respondent. The view of the Registrar that the Supreme Court held in *The Six Widows' Case* (1) that a ceremony was essential was erroneous. The evidence showed that the deceased respondent was admitted into, and maintained, in the household of the testator as a "t'sip" or secondary wife. The two women referred to in the will as wives were "t'sais," or were both so considered by the testator; the will therefore does not show that the testator did not regard the respondent as a "t'sip." On the contrary the reference to Ah Soo as "my daughter" strongly supports the respondent. The evidence of recognition of the respondent, both by the testator and by his "t'sais" established the existence of the relationship of a secondary wife; it is inconsistent with her being a mere mistress.

Latter replied.

Nov. 25. The judgment of their Lordships was delivered by

VISCOUNT FINLAY. This is an appeal from a decision of the Supreme Court of the Straits Settlements (Penang). The question is as to succession to the estate of a Chinaman named Cheang Ah Quee, who resided and carried on business in the Straits Settlements. The Supreme Court, reversing the decision of Sproule J., who had confirmed the Registrar's certificate, held that a Chinese woman, Tan Ah Loy, was a secondary wife of the deceased, and that her daughter by him, Ah Soo, was legitimate.

With regard to Chinese settled in Penang, the Supreme

(1) (1908) 12 Straits Settlements January, 1916. Unreported.
L. R. 120. (3) (1875) L. R. 6 P. C. 381.

(2) Supreme Court (Singapore), (4) (1907) L. R. 35 Ind. Ap. 41.

Court recognizes and applies the Chinese law of marriage. It is not disputed that this law admits of polygamy. By a local ordinance the Statute of Distributions has been applied to Chinese successions, and the Courts have treated all the widows of the deceased as entitled among them to the widows' share under the statute. No question has been raised on the present appeal as to the propriety of this practice; the only question is whether Tan Ah Loy was one of the widows.

Cheang Ah Quee, the deceased, was married early in life in China to Lim Ah Chen, with the elaborate ceremonies appropriate to marriage with a "t'sai" or principal wife; she remained in China and survived him. After his removal to the Straits Settlements he married, in accordance with a practice which has there been recognized as legal, three other women successively as "t'sais," one of whom, Tan Gek Im, survived him. While residing at Penang he had by Tan Ah Loi, who resided in his house, three children. Two of them died early, but one survives, Cheang Ah Soo. In the will of the deceased he mentions by name Lim Ah Chen and Tan Gek Im as his wives, and refers to sons and daughters named in the will, "or who may hereafter be born by either of my said wives or by any concubine who now is or who may be hereafter living with me." This will was in English, and contains a bequest "to my daughter Cheang Ah Soo, now an infant, dollars two thousand absolutely; provided that if she is still an infant at the time of my death the same shall be paid to her mother, Ah Loy, in trust for her; but provided also that if she should die without attaining twenty-one or marrying under that age, the said Ah Loy shall be entitled to keep the said dollars two thousand (\$2,000) for her own use."

Reliance was placed on the terms of this will by the appellants. It was urged that only two women are mentioned as wives, and that the reference to concubines would include Tan Ah Loy. The terms of the will *prima facie* tend to support the contention of the appellants; but they are far from conclusive, and the case must be determined upon the whole of the evidence.

J. C.
1919
CHEANG
THYE
PHIN
v.
TAN
AH
LOY.
—

J. C.
1919
CHEANG
THYE
PHIN
v.
TAN
AH
LOY.
—

The whole matter was referred to the Registrar for inquiry, and his certificate is dated December 24, 1915. He disbelieved evidence which had been given of the performance, in the case of Ah Loy, of a ceremony such as sometimes, at all events, is performed when a woman is taken as a “t’sip,” or secondary wife, and sums up his conclusions thus: “I find therefore that no ceremony was performed in the case of Ah Loi, and that, though she was a ‘t’sip,’ she is by the decision in the *Six Widows’ Case*”—namely, *Choo Eng Choon v. Neo Chan Neo* (1), “excluded from participation in the widow’s third of the property in respect of which there is an intestacy, and that her daughter, Ah Soo, is therefore not one of the next of kin of Cheang Ah Quee. By Chinese ideas she would be regarded as one of the next of kin, and in excluding her I am traversing these and following the decision by which I am bound.”

Their Lordships have carefully examined the decision in the *Six Widows’ Case* (1), and can find no foundation for the statement made in the certificate that the Court there decided that a ceremony was necessary to constitute a “t’sip.” It is unfortunate that, in consequence of this misconception, the Registrar thought himself bound to disregard Chinese ideas on the subject, and to dismiss the claim simply on the ground that there was no ceremony. The certificate was confirmed by Sproule J., but in the Court of Appeal it was pointed out that it was based on a misconception of the *Six Widows’ Case* (1), and that the present case must be decided on the view to be taken of the evidence as to Tan Ah Loy’s position. Their Lordships have before them the Registrar’s notes of the evidence on the inquiry, which form part of the record, and they entirely agree with the view taken by the Court of Appeal (Bucknill C.J., Earnshaw and Ebdon J.J.) that the position of Tan Ah Loy as a secondary wife has been established. Indeed, so far as questions of fact are concerned, it would appear that their findings are in accordance with the view of the Registrar himself.

It is clear that a ceremony of marriage is necessary to constitute the relation of principal wife or “t’sai,” and the

ceremony is one in which both the bridegroom and the bride must take part. By Chinese law a man may have secondary wives or “t’sips,” as they are sometimes called. The position of a secondary wife is superior to that of a mere concubine, though this term is sometimes applied to a “t’sip.” It is usual that there should be some sort of ceremony when a “t’sip” is taken, but it is not a ceremony of marriage; indeed, the man is not usually present when it does take place. The “ceremony” varies in its details, but the principal features of it are the doing of obeisance to the “t’sai” by the prospective secondary wife, and the offering of tea by the latter to the “t’sai” and the relations.

In the *Six Widows’ Case* (1) Hyndman Jones C.J. said in the Supreme Court: “The evidence, therefore, is very contradictory, but I am disposed to think that when it is intended to take a woman into a man’s household as a concubine for the purpose of securing a succession, or at all events as more than a temporary mistress, there is some sort of ceremonies; although these ceremonies, in some districts and among some classes, are of a more or less perfunctory character, and always much less elaborate than those adopted in the case of taking a ‘t’sai.’” And he goes on to say that, subject to divorce, the union with the “t’sip” is regarded by the law as being of a permanent nature. Braddell J. says (2), referring to what the Chief Justice had said: “I entirely adopt this exposition of the Chinese law given in the judgment of the Chief Justice and concur with him in the conclusion at which he has arrived, namely, that concubinage is recognized as a legal institution under Chinese law conferring upon the ‘t’sip’ a legal status of a permanent nature, which subject to divorce entitles her to maintenance during her lifetime.” There is nothing in the *Six Widows’ Case* (1) justifying the proposition that the Court decided that a ceremony was essential.

The evidence in the present case falls under two heads: I. Evidence to show that there was in Ah Loy’s case a ceremony appropriate to the taking of a “t’sip”; and II. evidence to

J. C.
1919
CHEANG
THYE
PHIN
v.
TAN
AH
LOY.
—

(1) 12 Straits Settlements L. R. 120, 187. (2) Ibid. 209.

J. C.

1919

CHEANG

THYE

PHIN

v.

TAN

AH

LOY.

show that the position of Ah Loy in the household was that of a "t'sip."

I. Evidence was given as to the ceremony by Tan Ah Loy herself. She stated that she was married to the deceased when she was twenty-two, that she was then living in the house of Teng Nyong, the "t'sai" of the deceased, that she worshipped the joss and served tea to the "t'sai" and a sister-in-law of the deceased, and that there was a feast with over ten guests present, and she was confirmed by Oh Kit Niang. The learned Registrar refers to the evidence of two witnesses on the other side and speaks of the evidence as to the ceremony as fairly balanced, but finds that there was no ceremony. He therefore considered himself as bound to decide that Ah Loy was not legally a wife, and that her daughter was therefore not one of the next of kin of the deceased. There is great force in the criticisms passed by Ebdon J. in the Court of Appeal upon the reasoning of the learned Registrar on the question of the ceremony in point of fact, but it is not necessary to arrive at any conclusion on this point. All the judges of the Appeal Court held that a ceremony, though usual, was not essential to constitute a secondary wife. The view taken by them on this point is entirely consistent with the *Six Widows' Case* (1) and with the view of the majority of the Court of Appeal in *Ngai Lau Shia v. Low Chee Neo* (2), decided at Singapore in January, 1916, and reported in an appendix to the record in the present case. Their Lordships see no ground for differing from the conclusion arrived at upon this point in the Court below.

The Registrar did not accept the evidence that a ceremony had taken place in the present case, and on a point of this kind the opinion of the tribunal before which the evidence was taken is, of course, entitled to the greatest weight. It is, however, difficult to see that there was any sufficient ground for his finding that no ceremony was performed. If a woman has been in fact a "t'sip," the performance of the slight ceremony which is often performed in such cases might, if it were essential, be readily inferred from the evidence as to the position which she had in fact occupied.

(1) 12 Straits Settlements L. R. 120, 209.

(2) Ibid., 187.

It is not easy to see what evidence there was to justify the express finding of the Registrar that no ceremony had taken place, even if the evidence was not regarded as sufficient to establish affirmatively the fact of a ceremony.

II. All the judges in the Court of Appeal found that the evidence established that in fact Ah Loy was a "t'sip" or subordinate wife. The evidence as to all the claims was taken together. The witnesses who gave evidence which is worth notice with reference to Tan Ah Loy's position were Tan Ah Loy herself (R., pp. 25-27), Neoh Guat Neoh (R., pp. 23-25), Cheang Ah Soo (R., pp. 29 and 30), Oh Kit Niang (R., pp. 30 and 31), Lam Kin Shang, husband of Ah Soo (R., pp. 31 and 32), Cheang Thye Phin, son of the deceased by Teng Nyong (R., p. 35), and Tan Yok Moi (R., p. 37).

The evidence appears to establish that Tan Ah Loy's relation with the deceased was one of a permanent nature, and that the offspring of the union was recognized by the father. It further establishes that there was recognition of Tan Ah Loy's position by the first "t'sai" in China on the occasion of the three visits which Tan Ah Loy paid to her in company with the deceased. It appears also that Tan Ah Loy, after the deceased's death, resided with his second "t'sai," Tan Gek Im, at Penang, and that lady in her will speaks of Ah Soo as her stepdaughter and of Ah Loy as her sister, leaving legacies to each. Ah Soo's name appeared on the tombstone of the deceased. There was also other evidence of recognition. But, in truth, it is not necessary to labour this part of the case. The Registrar himself found that Ah Loy was a "t'sip," by which it is clear he means a secondary wife, although, owing to his misconception of the law, he found that the absence of a ceremony was fatal to her claim. Sproule J. simply upheld the Registrar's certificate. In the appellate Court the Chief Justice says that the Registrar was quite right in his decision that the woman was a "t'sip," and proceeds to say: "What had we here to justify the finding? Very much. Some twenty-six years' maintenance and residence under deceased's roof; three children by deceased, one of whom survives the deceased, is referred to by the deceased in his

J. C.
1919
CHEANG
THYE
PHIN
v.
TAN
AH
LOY.
—

J. C.
1919
CHEANG
THYE
PHIN
v.
TAN
AH
LOY.
—

will as 'daughter,' and is given a legacy; recognition by the original 't'sai'—the first real wife who was wedded and remained in China—as a concubine; recognition by another—a Penang—so-called 't'sai' (called 'wife' by the deceased) as a concubine, designated in her will as 'sister,' and, very important, with whom after the deceased's death she lived, and by whom she was left a legacy; and recognized also as a true concubine by other members of the family. Such was no temporary liaison, nor its object a mere casual mistress. Whether or not her effort to prove a ceremony was true matters not. I think the decision that the woman was a 't'sip' was right, and as such she is entitled to participate in the intestate estate."

Earnshaw J. also found that Tan Ah Loy was a secondary wife or "t'sip" of Cheang Ah Quee, and on his death became a lawful widow of him and therefore entitled to the widow's third in case of intestacy. He summarises the evidence as to her position and concludes: "Tan Ah Loy is thus recognized as a member of the family both by the Chinese and the Penang branches. The absence of any ceremony in the circumstances is not of any importance."

Ebden J. referred to a number of circumstances already adverted to by the other members of the Court, and laid stress upon two facts as to Ah Soo as throwing light on her mother's position. He says: "Cheang Ah Soo was allowed a munificent portion by the trustees on her marriage. The fact that her name is on Cheang Keng Kwi's tombstone indicates recognition either of legitimacy, in the Chinese sense of the word, or of full adoption, and legitimacy of the child must imply the lawfulness of the union of which it is the offspring." He states his conclusions in the following terms: "I certainly agree with the rest of the Court that Tan Ah Loy's claim to the position of a lawful consort has been fully made out, and that by the principle which has been so fully established by former decisions of the Courts of the colony as to be beyond our power of alteration, she is entitled to participate in the widow's third of the property in respect of which there has been found to be an intestacy. I also find that the Registrar was wrong

in refusing to accept Cheang Ah Soo as one of the next-of-kin to Cheang Keng Kwi."

On a question of fact of this kind their Lordships would be very slow to differ from the conclusion arrived at by the Registrar and by all the judges before whom the case has come, but they think it right to add that they entirely agree that it has been proved that in point of fact Tan Ah Loy was a secondary wife.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *Nesbit, Drew & Loughborough.*

Solicitors for respondent : *Shelton & Co.*

J. C.

1919

CHEANG

THYE

PHIN

v.

TAN

AH

LOY.

[PRIVY COUNCIL.]

MICK SIMMONS, LIMITED APPELLANTS ;

AND

ROFE RESPONDENTS.

J. C.*

1919

Dec. 1.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Landlord and Tenant—Lease of Premises in Sydney—Rate on Land Value—Deduction from Rent—Adjustment by Tax Commissioners—Sydney Corporation (Amendment) Act, 1908 (N. S. W., 1908, No. 27), s. 11, sub-s. 2.

Upon the true construction of s. 11, sub-s. 2, of the Sydney Corporation (Amendment) Act, 1908, the right of a lessee to recover from the lessor, or to deduct from the rent, in respect of a rate imposed under that Act and paid by the lessee, is conditional upon the proportional amount payable by the lessor having been determined by the Commissioners of Taxation upon an adjustment under s. 4 of the Land Tax (Leases) Act, 1902, and this is so although the lease is for less than thirty years.

Judgment of the Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court of New South Wales (July 6, 1918), upon a special case stated by consent for the opinion of the Court sitting in banco.* The facts appear from the judgment of their Lordships, the question

Present : VISCOUNT FINLAY, LORD SUMNER, LORD PARMOOR, THE LORD JUSTICE CLERK, and SIR ARTHUR CHANNELL.

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.
—

for determination being as to the true construction of the Sydney Corporation (Amendment) Act, 1908 (N. S. W., 1908, No. 27), under which Act, and (as to the year 1917) the Sydney Corporation (Amendment) (No. 2) Act, 1916 (No. 2 of 1916), rates were made by the Municipal Council of Sydney and paid by the appellants or (as to 1909 and 1910) by the firm of Mick Simmons. It was a term of the lease and of the agreement that the lessees should pay all rates and taxes, excepting land tax, which might be payable in respect of the premises. The special case was heard before Pring, Gordon and Harvey JJ., who by their judgment given on July 6, 1918, decided that as there had been no adjustment of the Commissioners of Taxation under s. 4 of the Land Tax (Leases) Act, 1902, the appellants were not entitled to make any deduction from their rent.

The Supreme Court granted leave to appeal to His Majesty in Council.

1919. Oct. 21, 22. *Luxmoore K.C.* and *G. Lawrence* for the appellants. The appellants were entitled to make the deductions in question. They were not liable to pay land tax in respect of the premises under the Act in force before the Sydney Corporation (Amendment) Act, 1908, and were therefore not liable as between themselves and the respondent under s. 11, sub-s. 2, of that Act for any part of the rates now in question. The power of the Commissioners of Taxation under s. 4 of the Land Tax (Leases) Act, 1902, to make an adjustment between the owner and lessee has no application when the lease is for a term of less than thirty years, and that power was not extended by s. 11, sub-s. 2, of the Act of 1908, so as to apply to that case.

W. Finlay K.C. and *Bremner* for the respondent. On the true construction of s. 11, sub-s. 2, of the Act of 1908, it is a condition precedent to any right to deduct the rate from the rent that there should have been an adjustment by the Commissioners of Taxation. Sect. 11, sub-s. 2, includes all leases whether for thirty years or for a less term, although no doubt the Land Tax (Leases) Act, 1902, itself applied only

to leases of which not less than thirty years were unexpired at the commencement of that Act. This view is strongly supported by the considerations (1.) that under s. 11, sub-s. 2, "any person interested" may notify the Council of an agreement, and (2.) that "land tax" as well as "tax in lieu of land tax" is referred to, since the reference to "land tax" has no meaning unless leases for under thirty years are included. Further, s. 11, sub-s. 2, contains a clause which expressly provides that there may be recovered from the lessor or deducted from the rent "the proportionate amount of rates determined as aforesaid by the Commissioners."

Luxmoore K.C. replied.

[In the course of the argument reference was made to the enactments and to the two cases mentioned in the judgment of their Lordships.]

Dec. 1. The judgment of their Lordships was delivered by VISCOUNT FINLAY. This case raises an important question on the construction of the Sydney Corporation (Amendment) Act, 1908.

The appeal is brought by a company which has a lease for twenty years of premises in Sydney of which the respondent is the owner. The Act provides for a rate on the unimproved value of land within Sydney, and for the suspension there of the New South Wales Acts imposing taxation in the nature of land tax. Such a rate was made in Sydney, and the appellant company as lessee was compelled to pay it. The appellant company claimed contribution from the respondent as owner and made a deduction from the rent payable to him of amounts equal to one penny in the pound on the unimproved capital value of the premises in respect of the payments which had been made. This took place with regard to a number of such rates during a succession of years. This action was brought by the respondent to recover the amounts of rent so deducted (650*l.* 16*s.* 8*d.*). No adjustment of the respective liabilities of lessor and lessee in respect of these rates had been made by the Commissioners of Taxation, and the action was allowed on the ground that the deductions had been wrongly made,

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.

J. C.

1919

MICK
SIMMONS,
LIMITED
v.
ROFE.

as such adjustment by the Commissioners was a condition precedent to the right to deduct.

The facts were stated in the form of a special case. The respondent (the plaintiff in the action) is the owner in fee of certain land in Sydney on which the premises Nos. 720 and 722, George Street, were erected. When the respondent became the owner the premises were in the occupation of a firm carrying on business under the name of Mick Simmons, and this firm, on September 20, 1907, agreed with the respondent to take a lease from him of the premises for twenty years, the lessees to pay all rates and taxes except land tax. The business of the lessees was acquired by the appellant company and the lease was granted by the respondent direct to this company on October 21, 1910, for twenty years from September 1, 1907, and on the terms which had been agreed with the firm. The Municipal Council of Sydney, in accordance with the Sydney Corporation (Amendment) Act, 1908, duly made and levied a general rate of one penny in the pound on the unimproved capital value of rateable land within the city of Sydney. Such a rate was made in 1909, and in each succeeding year down to 1917. These rates were paid by the lessees, the present appellants, and it is in respect of them that the deductions from the rent were made which the owners now challenge on the ground that there had been no adjustment by the Commissioners of Taxation.

The case depends entirely on the construction of the Sydney Corporation (Amendment) Act of 1908, but in order to make that Act intelligible it is necessary to refer to the antecedent legislation in New South Wales with regard to the taxes upon land which were superseded in Sydney by this Act. This earlier legislation will be found in (a) The Land and Income Tax Assessment Act, 1895 (59 Vict. c. 15) (with which must be read the Land Tax Contribution Act, 1900 (64 Vict., No. 46)), and (b) The Land Tax (Leases) Act, 1902 (2 Edw. 7, No. 115).

The Land and Income Tax Assessment Act of 1895 by s. 10 imposes a land tax at such rate as should be from time to time declared and enacted to be paid by the owner in respect of land for every pound of the unimproved value thereof

as assessed under the Act after deducting the sum of 240*l*. Sect. 12, as amended by the Land Tax Contribution Act, 1900, made provision that, if two or more persons were owners, each should be liable to the Crown for the whole tax, but gave a right to recover by way of contribution from any other person having an estate in the land a sum bearing the same proportion to the tax as the value of the estate of such other person in the unimproved value of the land bore to the whole unimproved value of the land. The term "estate" was defined as including any interest in the land whatsoever, but no one was to be liable to contribution who was not entitled to an estate or interest in possession. By s. 67 the "owner" was defined as including every person who is entitled to any estate of freehold in possession or to the receipt of the rents if the land be let.

Under this legislation the liability to the Crown was thrown upon the "owner," with a right to recover a proportional contribution from any other person who had any estate in the land, which would include the case of a lessee with a beneficial interest in the land under his lease: *Houison v. Metropolitan, etc., Investment Association*. (1)

In 1902 it was considered desirable to deal specially with the case of land held by a lessee on a long lease. Such a lessee might be considered as himself in the position of an owner, and accordingly provision was made for adjusting in the first instance the liabilities to the Crown of the owner and such a lessee respectively. This was carried out by the Land Tax Leases Act, 1902, which commenced and took effect on the 1st January, 1903. In this Act the term "owner" has the meaning given it in the Act of 1895, which has been already quoted. The Act applied only to land while subject to a lease from the owner which was current at the commencement of the Act and of which not less than thirty years were then unexpired, or subject to a lease from the owner made after such commencement for a term of not less than thirty years (s. 2). The Act made provision for levying taxes, which were to be in lieu of land tax or any contribution thereto under the Land and Income Tax Act of 1895, the Land

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.

(1) (1899) 20 S. R. (N. S. W.) 316.

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.

Taxes Act of 1895, or the Land Tax Contribution Act, 1900, and s. 4 contained the enactment of such taxes: "A tax at the rate of one penny in the pound on the unimproved value of any land to which this Act applies shall be paid to the Commissioners by the owner and the lessee for a term of not less than thirty years of such land. The Commissioners shall fairly and equitably adjust such tax between such owners and lessees according to their respective interests in the land as unimproved, and such adjustment shall be final and shall not be subject to an appeal in any Court."

This Act therefore imposed a new tax, in lieu of the old, upon land subject to a lease having thirty years or more to run. The "owner" and the lessee were to be assessed to the new tax each for the amount fixed by the Commissioners in their adjustment. It was not a case of liability on the part of the owner with a right to contribution, but of original liability to the Crown for a certain proportion only of the tax.

The decision in the present case turns entirely upon the provisions of the Sydney Corporation (Amendment) Act, 1908, which amended the Sydney Corporation Act, 1902, described as the principal Act. The statutes before 1908 to which reference has so far been made are of importance only in so far as their provisions are incorporated in, or may affect the construction to be given to, the Act of 1908. That Act is one of a series of enactments in New South Wales in which the Legislature pursued the policy of replacing the land tax and tax in lieu thereof by rates to be levied in the various shires and municipalities in New South Wales upon the unimproved capital value of all rateable property within the shire or municipality.

The first of these enactments was the Local Government (Shires) Act, 1905, which provided for the division of the State, exclusive of municipalities, into shires to be administered by elective Councils. Each Council was required to make a levy in each year of a general rate upon the unimproved capital value of all rateable land in each shire, on the imposition of which rate the Governor was required to suspend the operation of the Land Tax Acts in the shire by Proclamation; and in 1906, by the Local Government Extension Act of that year, the provisions

of s. 33 of the Shires Act were applied to municipalities other than Sydney, but with certain modifications. Reference may be made on the subject of this legislation to the judgment in the High Court of Australia in *Solomon v. New South Wales Sports Club*. (1)

In 1908 this process of substitution was applied to Sydney by the Sydney Corporation (Amendment) Act, 1908. The following provisions of that Act are material: By s. 3 the term "owner" is to have the same meaning as was given to it by the Land and Income Tax Assessment Act of 1895 above quoted. Sect. 4 provides that the Council shall in 1909 and for every succeeding year make a general rate of not less than one penny in the pound upon the unimproved capital value of all rateable property in the city, such rate to be in addition to any rate under the principal Act or any other rate under this Act, and not to exceed a certain maximum. Sect. 5 provides that the Governor shall forthwith on the imposition of such rate on the unimproved capital value proclaim that the operation of the enactments mentioned in Sched. 3 to the Local Government Act, 1906, is suspended, and that the operation of these enactments shall thereupon be suspended in the city. The enactments referred to as mentioned in Sched. 3 to the Act of 1906 include certain Acts to which reference has already been made in this judgment—namely, the Land and Income Tax Assessment Act of 1895 so far as it relates to land values taxation, the Land Tax Contribution Act of 1900, and the Land Tax (Leases) Act, of 1902. Sects. 6, 7, 8 and 9 provide for a valuation of the unimproved capital value of all rateable property in the city. The section on the construction of which the result of this appeal must depend is s. 11, and it is necessary to cite it in extenso.

" 11. (1.) The amount of any rate under this Part shall be paid to the Council by the owner of the property in respect of which the rate is levied, unless the property is vested in and under a lease from the Council granted for a term of not less than thirty years, in which case the amount of any such rate shall be paid by the lessee from the Council or the person

(1) (1915) 19 C. L. R. 698.

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.

J. C. for the time being receiving or entitled to receive the rack
1919 rents of the property.

MICK
SIMMONS,
LIMITED
v.
ROFE.

“(2.) Provided that where a lessee of rateable property has before November 1, 1908, agreed with the owner, or with the mesne lessee from whom he immediately holds, to pay municipal or local government taxes, whether under those designations or under any words of description which would include municipal or local government taxes, the owner and all the lessees, including mesne lessees, shall, notwithstanding such agreement and during the currency of such agreement, be respectively liable, as between themselves, for so much of the rate under this Part as is equal to the amount of the land tax, or tax in lieu of land tax, on the land which they respectively would have been liable to pay under the Acts mentioned in Sched. 3 to the Local Government Act, 1906, if the operation of the said Acts had not been suspended, based on the valuation of the unimproved capital value under this Part. The adjustment of the Commissioners of Taxation under the fourth section of the Land Tax (Leases) Act, 1902, shall be made on the application of any person interested in such agreement, and shall be on the basis of such valuation, and of a land tax or tax in lieu of land tax, without exemptions, and after the first adjustment, there shall be a readjustment by the Commissioners at every subsequent period of valuation. Such adjustment may be made, notwithstanding the suspension of the operation of the said Act, and shall be final and shall not be subject to appeal in any Court.

“Any person interested in any such agreement as aforesaid may notify the Council of the terms of such agreement. Where such notification has been received by the Council, such Council shall (notwithstanding the provisions of sub-s. 1 of this section) first proceed for the recovery of the whole of any rates due under this Part from the lessee who is the last lessee within the knowledge of the Council bound by any such agreement. Unless the Council be notified as aforesaid before the making of any rates, the Council may recover the whole of the rates from such lessor.

“Failing in any legal proceedings against any person as

aforesaid the Council shall next so proceed against the lessor from whom such person immediately holds ; and, failing in any such proceedings against a lessor who is a mesne lessee, the Council shall next so proceed against the lessor from whom he immediately holds ; and so on.

“ Any lessee who has paid, or any mesne lessee who has paid or suffered the deduction as hereinafter provided of any such rates may recover as a debt from, or deduct from any moneys due to, the lessor from whom he immediately holds, the proportionate amount of rates determined as aforesaid by the said Commissioners to be the portion payable in respect of the property rated by all the persons under whom he derives title ; and any lessor who has made any payment to the Council or to his immediate lessor in respect of such rates may recover as a debt from any lessee under him such portion thereof as such lessee is liable for under his agreement, and the terms of this sub-section.

“ The Council, the Commissioners aforesaid, and any authorised servant of either of them, may demand the production within a reasonable time of any agreement as aforesaid from any owner, lessee, or person having the custody of such agreement, or require any person in occupation of land, or in receipt of the rent of land, to answer any question for the purposes of this sub-section. If such owner, lessee, or person refuses or neglects on demand as aforesaid to produce any such agreement, or if any person when duly required refuses to answer any question for the purposes of this sub-section, or wilfully makes a false answer thereto, he shall be liable to a penalty not exceeding fifty pounds. A certificate of such adjustment aforesaid purporting to be signed by the said Commissioners, or their secretary, or registrar, shall be prima facie evidence of such adjustment. In this sub-section the word ‘ lessor ’ includes his successors in title.”

The respondents contend that the effect of the section set out above is that the deductions in the present case were improperly made from the rent by the lessees (the appellants), on the ground that there had been no adjustment by the Commissioners and that on the construction of the clause

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.

such an adjustment is a condition precedent to deduction, and only amounts allowed by the Commissioners could be deducted. The Supreme Court of New South Wales so decided.

The wording of the clause is in parts obscure and requires careful consideration.

The first sub-section throws the payment of the new rate upon the owner, with an exception for the case of lessees from the Council for a term of not less than thirty years—an exception which is for the purposes of the present case immaterial.

The second sub-section is in the nature of a proviso upon the first and provides for the case of a lessee who has agreed with the owner to pay municipal taxes. It would obviously be a hardship if the effect of such an agreement were to throw upon the lessee the whole of the new rate which by this Act has replaced the land tax and tax in lieu of land tax. At the same time it was considered not unreasonable that such a lessee should, as to so much of the new rate as is equal to the amount of the old land tax or tax in lieu of it, bear the share which would have fallen upon him under the suspended Acts while they were in operation. A lessee in the position of the appellant lessees would have been liable, had there been no proviso, to pay the whole of the new rate under this Act, inasmuch as the exception of land tax from his agreement to bear rates would not apply to this rate: *Solomon v. New South Wales Sports Club*. (1) The proviso relieves him in respect of the specified amount of the rate from paying under such an agreement more than he would have paid under the Land Tax Acts towards the land tax or tax in lieu thereof for which it is substituted. Such a lessee, if for a term under thirty years, would have been liable to pay to the lessor a proportion by way of contribution towards the land tax according to the value of his estate in the land (see the Land and Income Tax Assessment Act, 1895, s. 12, and *Houison's Case* (2)), while if for a term of thirty years or over, he would have been made liable directly to the

(1) 19 C. L. R. 698.

(2) 20 S. R. (N. S. W.) 316.

Crown for a proportion under an adjustment by virtue of the Act of 1902. The effect of the proviso in the second sub-section of this clause is to keep the lessee as regards the rate, in cases where he has agreed to bear municipal rates, substantially in the same position as that in which he was with regard to the land tax or tax in lieu of land tax while the suspended enactments were in force.

So far the construction of the sub-section is pretty clear, but it goes on to provide machinery for carrying out this enactment in practice, and it is with regard to this machinery that the difficulty in the present case arises. The sub-section enacts :

“ The adjustment of the Commissioners of Taxation under the fourth section of the Land Tax (Leases) Act, 1902, shall be made on the application of any person interested in such agreement, and shall be on the basis of such valuation and of a land tax or tax in lieu of land tax, without exemptions, and after the first adjustment there shall be an adjustment by the Commissioners at every subsequent period of valuation. Such adjustment may be made notwithstanding the suspension of the operation of the said Act and shall be final, and shall not be subject to appeal in any Court.”

It was urged on behalf of the appellants that an adjustment under the fourth section of the Act of 1902 could have no reference to the present case where the lease is for less than thirty years, and point is given to this argument by the provision that such an adjustment may be made notwithstanding the suspension of the operation of the Act.

On the other hand, the adjustment is to be made “ on the application of any person interested in such agreement ”— words which would cover any agreement by a lessee of whatsoever term to pay municipal or local government taxes. The intention of the enactment was apparently to provide machinery for ascertaining the liability in all the cases which fall within the initial words of the sub-section. Further, as Pring J. pointed out in his judgment, in the provisions as to adjustment reference is made to the land tax as well as to the tax in lieu of land tax, while the Act of 1902 applies merely to tax in lieu of land tax. On these grounds it was

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.
—

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.

urged on behalf of the respondent that the words should be read as a mere adoption of the machinery of the Act of 1902, and not as confining its application to the cases dealt with in that Act.

There is certainly great difficulty in reconciling some of the language used with the general scope of the sub-section taken as a whole; but in their Lordships' opinion all doubt is removed by the terms of the paragraph last but one in the sub-section. That paragraph provides that any lessee who has paid any such rates may recover or deduct as against his lessor "the proportionate amount of rates determined as aforesaid by the said Commissioners to be the portion payable in respect of the property rated by all the persons under whom he derives title," and that any lessor who has paid may recover from any lessee "such portion thereof as such lessee is liable for under his agreement and the terms of this sub-section."

This paragraph points unequivocally to an adjustment by the Commissioners as essential to the right to recover or to deduct. The clause must be read as a whole, and it appears to their Lordships that the paragraph last but one supplies the key to the meaning which should be put upon its provisions. The adjustment is really made under the authority of s. 11, sub-s. 2, of the Sydney Corporation (Amendment) Act. It is applicable to all the cases with which that sub-section deals, and the words providing that it may be made notwithstanding the suspension of the Act of 1902 appear to be wholly unnecessary, and to have been inserted per incuriam.

The special case, after setting out the facts which have been outlined in this judgment, put four questions for the determination of the Court. The first was whether the whole amount deducted was improperly deducted. The Court below answered this question in the affirmative, taking the view that the deductions had all been improperly made, as there had been no adjustment. This first answer rendered unnecessary any answer to the other questions.

In the opinion of their Lordships, the decision of the Court

below was right, and they will humbly recommend to His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *Lumley & Lumley*.

Solicitors for respondent : *Snow, Fox & Higginson*.

J. C.
1919
MICK
SIMMONS,
LIMITED
v.
ROFE.

[PRIVY COUNCIL.]

ADDAR KHAN AND OTHERS APPELLANTS ;

AND

MULLINS RESPONDENT.

J. C.*
1919
Dec. 2.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Australia (Queensland)—Sugar Cultivation—"Employee"—Dictation Test—Exemption—Onus of Proof—Sugar Cultivation Act of 1913 (Queensland, 1913, c. 4), s. 4.

A person employed under a contract in cutting sugar-cane in Queensland at a remuneration depending upon the quantity cut is an "employee" within the meaning of that word as used in s. 4 of the Sugar Cultivation Act of 1913 (Queensland), and if he has not obtained a certificate of having passed the dictation test, can be convicted of an offence under that section, without proof that he was not entitled to exemption under the regulations made under the Act.

Judgment of the Supreme Court affirmed.

CONSOLIDATED APPEALS from a judgment of the Full Court of the Supreme Court of Queensland (October 8, 1918).

The appellants were Indians, and were employed on June 21, 1918, in the State of Queensland under a contract in cutting sugar-cane. On July 22, 1918, the Attorney-General for that State directed the respondent, a police constable, to lay a complaint and to prosecute each of the appellants for a breach of s. 4, sub-s. 2, of the Sugar Cultivation Act of 1913. The material terms of the Act and of the other relevant statutes sufficiently appear from the judgment of their Lordships.

In accordance with the Sugar Cultivation Act of 1913

* *Present*: VISCOUNT FINLAY, LORD SUMNER, LORD PARMOOR and THE LORD JUSTICE CLERK.

J. C.
1919
ADDAR
KHAN
v.
MULLINS.

regulations had been from time to time made by the Governor in Council. Regulation 3 provided for the exemption of certain classes of persons from the operation of the Act. Regulations 4, 5 and 6 provided for certificates of exemption being granted to certain of the persons so exempted. Regulations 7, 8, 9, 10 and 11 provided for the examination of and granting certificates to all persons other than those exempted from the operation of the Act, or who were holders of such certificates of exemption and who desire to be "employees" in or in connection with the industry. Regulation 12 provided for the production of certificates of exemption, or of having passed the dictation test. Regulation 12 was rescinded and there was substituted regulation 16, whereby it was provided that a certificate of having passed the dictation test, or a certificate of exemption, should, on the demand of any member of the police force, be produced to him. Regulation 15 provided that any person who desired a certificate of exemption must apply on or before December 31, 1913.

At the hearing by a police magistrate of summonses against the appellants under s. 4 of the Act evidence was given on behalf of the prosecution that each of the appellants was engaged in cutting cane, and that when asked to produce a certificate said that he had not one, and was engaged on contract work at so much a ton. No evidence was given on behalf of the appellants, but the submissions referred to in the judgment of their Lordships were made on their behalf. Each of the appellants was convicted and fined 1*l.* and costs.

On October 8, 1918, each of the appellants moved the Full Court of the Supreme Court of Queensland for an order to show cause why their convictions should not be quashed. The Full Court refused the applications, and on a later date gave leave to appeal to His Majesty in Council and consolidated the appeals.

1919. Oct. 24. *W. M. Slade* for the appellants. The appellants were not employees within the meaning of the Sugar Cultivation Act of 1913. They were independent

contractors who are not within the definition of "employee" in the Industrial Peace Act of 1912. That Act was repealed by the Industrial Arbitration Act of 1916. But the definition of "employee" in the last-mentioned Act cannot be regarded as a modification of the former definition having regard to the extent of the omissions and additions as compared with the former terms. No evidence was given that the appellants were not within one of the exempted classes enumerated in regulation 3. Regulation 15 was *ultra vires* s. 7, under which the regulations with regard to exemptions were made. That regulation prevented the appellants from obtaining the certificates of exemption to which they were entitled under the earlier regulations.

Sir John Simon K.C. and *d'Egville* for the respondent were not called upon.

Dec. 2. The judgment of their Lordships was delivered by

LORD PARMOOR. This is an appeal from a judgment of the Full Court of the Supreme Court of Queensland. In August, 1918, the appellants were summoned to appear at the Police Court at Cairns to answer a complaint under the Sugar Cultivation Act of 1913, that they were employed in the cultivation of sugar-cane, and the manufacture therefrom of sugar, not having first obtained a certificate of having passed the dictation test within the meaning of the Act, and not being exempted from the operation of the said Act by the regulations made thereunder. At the hearing, before the Magistrate, evidence was given on behalf of the prosecution that the appellants were Indians, working, without having obtained a certificate of exemption under the dictation test, at cutting cane for Charles Butler, a farmer residing at Edmonton, and were being paid so much a ton, on contract work. No evidence was called on behalf of the appellants, but the objections were taken: 1. That the men were not employed under the Sugar Cultivation Act of 1913. 2. That the men were not engaged in sugar cultivation, but in harvest work.

The appellants were convicted, and, on October 8, 1918,

J. C.
1919
ADDAR
KHAN
v.
MULLINS.

J. C.
1919
ADDAR
KHAN
v.
MULLINS.

appealed from such conviction on motion to the Full Court of the Supreme Court of Queensland for orders to show cause why their respective convictions should not be set aside. On the same day the Supreme Court refused the applications.

At the hearing of the appeal before their Lordships, the counsel for the appellants, in his clear argument, raised three questions: 1. That the Sugar Cultivation Act, 1913, did not apply to persons employed to cut cane by contract. 2. That no evidence was given by the prosecution that the appellants did not come within the exemption regulations. 3. That the appellants were wrongly prevented from applying for exemption by Regulation No. 15.

Sect. 4 of the Sugar Cultivation Act of 1913 enacts that "any person who has not first obtained a certificate of having passed the dictation test, who is employed in or in connection with such industry"—namely, of the cultivation of sugar-cane and the manufacture therefrom of sugar—"shall be guilty of an offence" and liable to the following penalties: ". . . . (c) in the case of an employee to a penalty not exceeding 40 shillings for each day that he is employed in contravention of this provision."

Their Lordships are of opinion that each of the appellants was so employed, but it was argued on their behalf that the penalties were only imposed on an employee, and that persons, working under contract, did not come within this definition. The expression "employee" in the Sugar Cultivation Act of 1913 has the same meaning as in the Industrial Peace Act of 1912. In that Act an "employee," unless the context otherwise indicates, means any employee, whether on wages or piecework rates, in any calling to which the Act applies, the term including any person whose usual occupation^{*} is that of employee in such calling. Mr. Slade contended on behalf of the appellants that this definition denoted the relationship of master and servant, and only applied to a person working as servant on wages or piecework rates, to the exclusion of a person working on contract. Owing to subsequent legislation it is not necessary to determine this question, but it must not be assumed that their Lordships would be prepared

to assent to this argument. By the Industrial Arbitration Act of 1916 (7 Geo. 5, No. 16) the Industrial Peace Act of 1912 is repealed, and the term "employee" is defined to mean any employee whether on wages or piecework rates or as a member of a butty-gang, the term including any person whose usual occupation is that of employee in a calling, and the definition provides that "the fact that a person is working under a contract for labour only, or substantially for labour only, shall not in itself prevent such person being held to be an employee."

The appellants are persons who in their usual occupation were employed in the cutting of cane, and they were working under a contract for labour only or substantially for labour only, so that if the modified definition is applicable, the fact that the appellants were working under such a contract would not exempt them from the operation of the Sugar Cultivation Act of 1913, or be an answer to the charge in the summons.

It is enacted in the Acts Shortening Act of 1867 that where an Act repeals and re-enacts with or without modification any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted. The Industrial Arbitration Act of 1916 does repeal the Industrial Peace Act of 1912, and re-enacts with modification the definition of "employee" contained in that Act. The reference therefore in the Sugar Cultivation Act of 1913 to the definition of "employee" in the Industrial Peace Act of 1912 must be construed as a reference to the definition of the employee as re-enacted in the Industrial Arbitration Act of 1916. The result is that the contention of the appellants that they were not employees, owing to the fact that they were working under contract, cannot be sustained.

On the second question it is clear that, if the appellants desired to claim that they came within the exemption regulations, it was for them to produce the necessary evidence. No such evidence was produced, and, so far as appears, no

J. C.
1919
ADDAR
KHAN
v.
MULLINS.

J. C.
1919
ADDAR
KHAN
v.
MULLINS.

such point was raised at the hearing before the magistrate. On the third question it was argued that Regulation 15—which provides that any person to whom the Sugar Cultivation Act of 1913 applies who desires to apply under Regulation 4 for a certificate of exemption must apply for such exemption to a clerk of petty sessions on or before December 31, 1913, and that no certificate for such exemption should be granted unless application therefor should be made on or before the said date—wrongly prevented the appellants from applying for exemption. Whatever the effect of this regulation may be, it has, upon publication in the Gazette, the same effect as if enacted in the Act, and is not open to be questioned in any proceeding whatsoever. It was not suggested that the regulation was beyond the power of the Governor in Council, or that there was any irregularity in the method of its publication.

In the opinion of their Lordships the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Leader, Plunkett & Leader.*

Solicitors for respondent: *Freshfields & Leese.*

[PRIVY COUNCIL.]

CANADIAN PACIFIC RAILWAY COM- }
 PANY } APPELLANTS;

AND

THE STEAMSHIP STORSTAD AND OTHERS, RESPONDENTS.

J. C.*

1919

Dec. 5.

Shipping—Collision—Proceeds of Sale of Ship to blame—Absence of Limitation Proceedings—Division between Claimants—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, Imp.), ss. 503, 504.

Unless a shipowner has taken proceedings under s. 504 of the Merchant Shipping Act, 1894, to limit his liability, s. 503 of that Act does not affect the rights inter se of claimants in respect of loss of life and personal injuries, and claimants in respect of damage to property.

A Norwegian ship of 6028 gross registered tons, which was held to be alone to blame for a collision, was sold for 125,000 dollars and the proceeds paid into Court in Canada. Claims amounting to 3,069,483 dollars, of which 469,467 dollars were in respect of loss of life and personal injuries, were proved against the shipowners, who had taken no proceedings to limit their liability. The Supreme Court of Canada made an order giving to the claimants in respect of loss of life and personal injuries a prior right over seven-fifteenths of the proceeds of sale:—

Held, that the order was wrongly made, and that the proceeds should be divided amongst all the claimants pro rata.

Judgment of the Supreme Court reversed.

APPEAL from an order of the Supreme Court of Canada (March 11, 1918) varying an order of the Exchequer Court of Canada, sitting in Admiralty.

The facts appear from the judgment of their Lordships.

The proceedings in the Supreme Court are reported at 56 Can. S. C. R. 324.

1919, Aug. 1, 5. *Tilley K.C.* for the appellants. The Exchequer Court of Canada had jurisdiction in the action in rem under the Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27, Imp.), s. 2, sub-s. 2, and the Admiralty Act (R. S. Can., 1906, c. 141), s. 3. The appellants do not now contend that the Canada Shipping Act (R. S. Can., 1906, c. 113)

* *Present*: VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, and LORD SUMNER.

J. C.
1919
CANADIAN
PACIFIC
RAILWAY
COMPANY
v.
THE
STEAMSHIP
STORSTAD.

applies to the present case. If either s. 921 of that Act or s. 503 of the Merchant Shipping Act, 1894 (Imp.), applies, it is the latter section. But s. 503 does not apply since no limitation proceedings were taken. The section does not lay down any general rule governing the rights of different classes of claimants inter se. There was no jurisdiction to apply the principle of s. 503 as an equitable mode of distribution apart from statutory authority: *The Saracen*. (1) *The Victoria* (2) and other cases referred to by Anglin J. in the Supreme Court do not support the view of the majority. Further, it is a condition to the application of s. 503 that the loss happened "without the actual fault or privity" of the shipowner; that condition was not affirmatively established in this case.

Languedoc K.C. for the respondents other than the steamship *Storstad*. These respondents—namely, the claimants on the fund in respect of loss of life—are entitled to the order appealed from. The principle of s. 503 applies although no limitation proceedings had been taken. Sect. 503 contains a substantive provision giving to claimants in respect of loss of life and for personal injuries a certain preference over other claimants. The Supreme Court rightly gave effect to that provision.

Dec. 5. The judgment of their Lordships was delivered by

LORD SUMNER. This appeal arises out of the disastrous collision between the *Storstad* and the *Empress of Ireland* which occurred in the St. Lawrence on May 24, 1914. The *Empress of Ireland* foundered, with much loss of life; the *Storstad* proceeded to her destination, Montreal. There she was arrested, and an action in rem was begun at the suit of the Canadian Pacific Railway Company, owners of the *Empress of Ireland*. Those who were entitled to make personal claims in respect of loss of life were in a position of some embarrassment, for the Maritime Conventions Act (3) does not apply to Canada, and the *Storstad* was the property and the only property of a single ship company, the Aktieselskabet

(1) (1847) 6 Moo. P. C. 56.

(2) (1888) 13 P. D. 125.

(3) 1 & 2 Geo. 5, c. 57.

Maritime, incorporated and domiciled in Norway. Pending a decision as to the responsibility for the collision they held their hands.

On April 27, 1915, the Exchequer Court of Canada, by the judgment of Dunlop J., sitting in Admiralty, held the *Storstad* to have been alone to blame. Against this decision there was no appeal. The ship was sold by order of the Court for 175,000 dollars, which sum was deposited in Court, and the question of the amounts of the claims was referred to the Registry, the owners of the *Storstad* taking no further part in the inquiry.

The claimants for loss of life then intervened in the action, and on March 22, 1916, an order was made in the terms and under the circumstances which are thus set out in the report to the Court made by the deputy District Registrar in Admiralty. "Whereas on March 22, 1916, at one of the adjournments of the reference, a large number of solicitors on behalf of the plaintiff intervenants and claimants, representing majority in number and amounts claimed, agreed and consented, that the deputy District Registrar do forthwith accept the claims of all the parties as being duly recorded and proved, that is to say, 'It is hereby admitted that the loss and damage of each of the said parties resulting from the sinking of the *Empress of Ireland* amount to the said sums' (referring to them) 'but without prejudice to the rights of any or all the parties as to their contentions, that the claims of any of them were filed too late, or as to their pretensions that some of the claims are entitled to payment in whole or in part by priority over others, and without waiver of any other rights, except only as to the amount of the said loss and damage in each case.' "

The proved claims amounted in the aggregate to 3,069,483.94 dollars, of which 469,467.51 dollars were for loss of life, and the residue was for loss of property. An acute conflict thus arose between the two interests, and in the result it has been held by the Admiralty judge and by a majority of the Supreme Court of Canada (with a variation not at the moment material) that the claimants in respect of life lost have an

J. C.

1919

CANADIAN
PACIFIC
RAILWAY
COMPANY
v.
THE
STEAMSHIP
STORSTAD.

J. C.
1919
CANADIAN
PACIFIC
RAILWAY
COMPANY
v.
THE
STEAMSHIP
STORSTAD.
—

absolute priority against so much of the sum in Court as is taken to represent 7*l.* per ton of the *Storstad's* registered tonnage, and further rank *pari passu* with the claim of the Canadian Pacific Railway Company against the remainder of the fund. The registered tonnage of the *Storstad* was 6028 tons gross.

No proceedings were ever taken by the owners of the *Storstad* for limitation of their liability, and the fund in Court, which was one sum and one fund and not two, was simply the proceeds of the sale with some accrued bank interest, and had no connection with the gross registered tonnage of the ship or the amounts of 15*l.* per ton or 8*l.* per ton or with the law relating to limitation of liability. Furthermore, the order above recited only admitted the now respondents as claimants on the fund in the action in rem, and gave them the benefit of the finding that the *Storstad* was alone to blame, and made no admission whatever as to the character of the fund in Court or as to any prior claim to it in favour of the life claimants. Their rights must rest and were only rested in argument on the effect of the limitation of liability sections in the Merchant Shipping Act. Before their Lordships the appellants abandoned part of the contentions raised below, and admitted that this statute and these sections alone are material.

The following passages from the judgment of Anglin J. conveniently give the reasoning which prevailed with the majority of the judges of the Supreme Court (1): "Sect. 503 is not merely an enactment for the shipowner's benefit limiting his liability. It contains a substantive provision for the advantage of claimants in respect of loss of life and personal injuries upon whom it confers valuable rights of priority. A construction which would make the existence and enforceability of those rights entirely dependent on the shipowner's seeking and obtaining a judgment under s. 504 declaratory of the limitation of his liability and fixing the amount thereof would seem so utterly unreasonable and so contrary to what Parliament apparently intended should be

(1) 56 Can. S. C. R. 338, 340.

the effect of the statute that, in my opinion, it should not prevail. Whether loss of life and personal injury claims are to have a limited preference over loss of property claims or are to rank *pari passu* with them on the entire fund available was not left to be determined by the action or the inaction of the shipowner whether prompted by interest or purely spontaneous. . . . Were the Court to distribute the money now available *pro rata* amongst all the claimants, as the plaintiff contends for, the policy of s. 503 of the Merchant Shipping Act would be defeated. It would be equally disregarded were the entire proceeds of the sale of the ship devoted to a fund available exclusively to satisfy demands in respect of loss of life and personal injury. The statute does not give them any such priority. It provides for the concurrent establishment of two distinct funds in which it defines different rights."

Their Lordships are unable to accept this reasoning. Limitation of liability is the creation of statute. It is a provision in favour of the shipowner, and operates to restrict the rights of those to whom he is liable. Incidentally the sections furnish the rule by which to determine the rights of parties interested in the fund created by the operation of the sections themselves, but if the shipowner, for whatsoever reason, does not bring the sections into operation, no one else can do so, and they do not in such case have effect. This is the result of the enactment itself, for it expressly provides for procedure to limit the shipowner's liability, and sets up no principle or rule as to the rights of different classes of claimants apart from such limitation. The owners of the *Storstad* took no proceedings for limitation of their liability. If she had turned out to be of such value that the amount ultimately paid into Court equalled the aggregate amount of the proved claims, they would have been paid in full, no matter how many pounds per gross register ton that amount represented. If the tonnage of the ship had been so small that the amount in Court exceeded 15*l.* per ton, the whole of it would, nevertheless, have been available in satisfaction of the proved claims. Nothing would have prevented the claimants as a

J. C.

1919

CANADIAN
PACIFIC
RAILWAY
COMPANY
v.
THE
STEAMSHIP
STORSTAD.

J. C.
1919
CANADIAN
PACIFIC
RAILWAY
COMPANY
v.
THE
STEAMSHIP
STORSTAD.

body from enjoying their full rights, arising out of the faulty navigation of the ship and the damage caused thereby, unless the shipowners had availed themselves of the statute. As they have not done so, nothing prevents a particular class of these claimants, in this case the appellants, from enjoying the full benefit of their legal rights. It is an accident, and an unfortunate one, that there is not money enough for all, but this accident gives the respondents no more and the appellants no less right than if the fact had been otherwise. If, instead of being made interveners in the Canadian proceedings by consent, the respondents had found it worth their while to sue the shipowners in Norway in personam, they would have been entitled, if successful, to a judgment for the full amount of their claim, notwithstanding the fact that the result of the proceedings in rem in Canada had withdrawn a part of their opponents' assets beyond the reach of execution on their judgment.

Since the sections do not apply, no more need be said now upon their construction and operation. Their Lordships will only add, that they are unable to find any ground for assuming a policy or intention on the part of the Legislature to establish a general preference applicable to all circumstances in favour of life claimants, or to treat any sum, which may happen to be in Court in a collision action generally, as if it had been brought into Court in one particular way under the statute.

The appellants contended further that the limitation of liability sections had no application, because it had not been shown that the loss of the *Empress of Ireland* happened without the actual fault or privity of the owners of the *Storstad*. Their Lordships refrain from discussing this point because it appears to them to be devoid of any substance. It was neither proved nor suggested that the *Storstad* was in any respect ill-found. She belonged to an incorporated company and not to natural persons, and it was proved at the trial that the whole cause of the collision was the bad navigation of the officer of the watch. In such circumstances what room can there be for discussion of the actual fault or privity of the Aktieselskabet Maritimee?

In the result the appeal succeeds, and with costs ; nor is there any ground for allowing the appellants' costs to be taken out of the fund in Court as suggested by the respondents. The judgments of the Court of Exchequer and of the Supreme Court should be set aside, and the case should be remitted in order that judgment may be entered, directing a division of the fund in Court among the different claimants, appellants and respondents, pro rata, in proportion to the amounts of their respective proved claims. Their Lordships will humbly advise His Majesty accordingly.

J. C.
1919
CANADIAN
PACIFIC
RAILWAY
COMPANY
v.
THE
STEAMSHIP
STORSTAD.

Solicitors for appellants : *Blake & Redden.*

Solicitors for respondents other than the *Storstad* :
Lawrence Jones & Co.

[PRIVY COUNCIL.]

H.M. SUBMARINE E 14.

J. C.*

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

1919
Dec. 8.

Prize Court — Prize Bounty — Destruction of Enemy Transport — Enemy "Armed Ship"—Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42.

An Order in Council of March 2, 1915, made pursuant to s. 42 of the Naval Prize Act, 1864, provided for the payment of prize bounty to such of the officers and crew of any of H.M.'s ships of war as were present at the taking or destroying of any "armed ship" of the enemy.

In May, 1915, a British submarine torpedoed and sank a Turkish transport having on board 6000 Turkish troops, who had with them rifles and ammunition, also six field guns so disposed on the ship's deck that, at suitable ranges, they could have been used with effect against the submarine. The ship was a Turkish fleet auxiliary manned by naval ratings and commanded by Turkish naval officers ; she carried as part of her regular equipment a few light quick-firing guns. The officers and crew of the submarine applied to the Prize Court for prize bounty :—

Held, that the meaning of the words "armed ship" in s. 42 was not limited to a ship commissioned and armed for the purpose of offensive action in a naval engagement, and that the applicants were entitled to prize bounty under the Order in Council.

Judgment of the Prize Court reversed.

* *Present* : LORD SUMNER, LORD PARMOOR, THE LORD JUSTICE CLERK, and SIR ARTHUR CHANNELL.

J. C. APPEAL from judgments of the Admiralty Division (in Prize)
 1919 dated February 21, 1917 (1), and November 25, 1918. (2)
 H.M. The officers and crew of H.M.'s Submarine *E 14* by a motion
 SUBMARINE in the Prize Court sought a declaration that they were entitled
 E 14. to 31,375*l.* as prize bounty for the destruction of the Turkish
 transport *Guj Djeml* on May 10, 1915. The prize bounty
 was claimed under an Order in Council of March 2, 1915,
 made in pursuance of s. 42 of the Naval Prize Act, 1864
 (27 & 28 Vict. c. 25), which refers to the destruction of any
 "armed ship" of the enemy.

The President (Sir Samuel Evans) by a judgment delivered on February 21, 1917, held that the meaning of the words "armed ship" in s. 42 was "a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement." He found that the evidence before him did not bring the *Guj Djeml* within that description and dismissed the application, but without prejudice to the claimants renewing it upon any further evidence that might be forthcoming.

The motion was renewed before the President (Lord Sterndale) on November 25, 1918, further evidence being adduced. The effect of the evidence given upon the two applications appears from the judgment of their Lordships.

Lord Sterndale P. considered that he was not at liberty to depart from the principles laid down in the decision above referred to, and held that the fresh evidence did not render the transport an "armed ship" within those principles. The motion was accordingly dismissed.

1919. Oct. 21. *Sir Erle Richards K.C.* and *G. P. Langton*. for the claimants. Prize bounty was payable under the Order in Council, since upon the evidence the *Guj Djeml* was an "armed ship" of the enemy. There is nothing in the Acts in force before the Naval Prize Act, 1864, nor in the decisions, which indicates that the meaning of the plain words used should be limited as held in the Prize Court. [Reference was made to *Several Dutch Schuyts* (3); *L'Alerte* (4); *La*

(1) [1917] P. 85.

(3) (1805) 6 C. Rob. 48.

(2) Unreported.

(4) (1806) 6 C. Rob. 238.

Clorinde (1) ; *The Sedulous* (2) ; 6 Anne, c. 13, s. 8 ; 43 Geo. 3, c. 160, s. 37 ; 45 Geo. 3, c. 72, s. 5 ; 17 & 18 Vict. c. 18, ss. 3, 11.] Prize bounty has been awarded under the Order in Council for the sinking of ships not coming within the principle applied in the present case—namely, a patrol ship and an armed minelayer: see *H.M. Submarine E. 11* (3), and *The Konigen Luise*. (4)

J. C.
1919
H.M.
SUBMARINE
E 14.

Sir Gordon Hewart A.-G. and *J. G. Pease* for the respondent, the Procurator-General. The view of the late President as to the meaning of the words “armed ship” was right. The reference in s. 42 to “the beginning of the engagement” and the basis upon which the bounty is to be computed indicate that what was meant was a fighting unit of a fleet. In the unreported cases in which during the present war prize-bounty has been awarded for the destruction of patrol ships, minelayers, or armed auxiliary ships, the point that the Order in Council did not apply was not taken.

Dec. 3. The judgment of their Lordships was delivered by

LORD SUMNER. In this appeal the commander, officers and crew of H.M.’s Submarine *E 14* seek, pursuant to 27 & 28 Vict. c. 25, s. 42, and the Order in Council dated March 2, 1915, to establish their right to a grant of 5*l.* per head of the 6000 Turkish troops, and of the 200 ship’s complement, who were on board of the *Guj Djeml*, when they destroyed her with a torpedo in the Sea of Marmora, near Kalolimno Island, on May 10, 1915. The troops had their rifles and ammunition, and with them were six Krupp 75-mm. field guns, also with ammunition, and so disposed on the ship’s deck astern that at suitable ranges they could have been used against the *E 14* with effect. The ship herself was part of the Ottoman naval force, a fleet auxiliary manned by naval ratings and commanded by officers of the Navy of the Sublime Porte, and she carried a few light quick-firing guns as part of her regular equipment, with which she could defend herself, if necessary. At the time in question she was acting as a troop

(1) (1814) 1 Dod. 436.

(2) (1813) 1 Dod. 253.

(3) Lloyd’s List, June 26, 1916.

(4) Lloyd’s List, Feb. 27, 1917.

J. C.
1919
H.M.
SUBMARINE
E 14.

transport, and this would appear to have been her regular employment. She was on her way to the Dardanelles, and it was known to the Turkish Government that British submarines had passed up the Straits for the purpose, among others, of interfering with that traffic.

By s. 42 of the Naval Prize Act, 1864, the right in question would attach if the *Guj Djeml* was, in the words of the section, "an armed ship of any of His Majesty's enemies." This is entirely a matter of construction of the section in its application to the facts of this case, and no other question was raised in the appeal. Little assistance, if any, is to be derived from prior decisions or earlier legislation. No decision before the war turned on or touched this section, and in the cases decided during the war the present contention had not been raised. The older Acts go back for many generations. At one time the number of guns, and not of men carried by the ship destroyed, was the measure of the grant, and until the Crimean War the expression, "armed ship," was not used. No settled practice was shown to have existed in the grant of "head money," as it was called, that could be regarded as affecting the ordinary meaning of the words of the section, and no reasons of policy were suggested, which would point to an intention to use those words in one sense rather than in another.

It is plain on the facts that the *Guj Djeml* was a ship, and a large one; that she was a ship of His Majesty's enemies, a unit in the Turkish fleet; and that she was armed. If then these single and undisputed facts are put together, she was in fact "an armed ship of His Majesty's enemies." Why was she not so within s. 42? It is true that she was used to transport troops. It is true also that she got no chance to use her arms, or at least none that Turkish troops or seamen were minded to take; such is the nature of an injury by a well-placed torpedo. It is true that she did not go forth to battle, nor was she in any case fit to lie in the line, but the section says nothing about this. It may be that her regular service consisted in carrying troops and stores, and that her combatant capacity was not high, but it can hardly be doubted

that, if a suitable opportunity had occurred, it would have been her duty to fight and even to attack a hostile submarine.

The contention presented on behalf of the Crown was, that her main character was that of a transport, and that the fact that she was armed was only an incident. The section, however, does not distinguish between the purposes for which the armed ship is armed, nor does it confer or withhold the grant according as the armament carried is the main or an incidental characteristic of the enemy Sovereign's ship. The contention prevailed with the late President, who gave effect to it in the following words(1): "An armed ship, within the meaning of the section to be construed, is a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement."

Evidently this proposition is open to several objections. It makes the rights of H.M.'s forces depend on the purpose with which his enemies may have despatched their vessel, on what either way is a warlike service. It employs a term—"offensive action" which, in practice, is of indefinite meaning, and in any case involves an inquiry into the state of mind of the hostile commander. Sir Samuel Evans elucidated his meaning thus in another passage: "In my opinion, if it were proved that she carried a few light guns, that would not constitute her an armed ship any more than a merchant vessel armed for self-defence; nor would the fact that she carried troops armed with rifles and some field guns and other ammunition intended to be used after the landing of the troops."

Their Lordships are unable to accept these propositions. Of the case of a merchant ship they say nothing, for this is a question on the meaning of the words "ship of the enemy," and the appellants did not contend, nor needed they to do so, that any ship but one in State service would be covered by those words. There is again no evidence that the rifles and field pieces were not intended to be used at sea under any circumstances, little as any occasion for their use was to be looked for, and it must be recollected that defence is not

J. C.

1919

H.M.

SUBMARINE
E 14.

(1) [1917] P. 85, 89.

J. C. 1919 H.M. SUBMARINE E 14. confined to taking to one's heels or even to returning a blow, but, in the jargon of strategy, may consist in an offensive-defensive, or in plain words in hitting first. No criteria would more embarrass the application of the enactment than these, and to introduce the test of the ship's commission is to introduce something which involves a rewriting of the section.

Their Lordships are of opinion that the words of the section are plain, and that the facts fit them, and accordingly the appellants are entitled to succeed ; that the decree appealed against should be set aside ; and that this appeal should be allowed with costs, and that the case should be remitted to the Prize Court to make such formal decree in favour of the appellants as may be required. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *Botterell & Roche*.
Solicitor for respondent : *The Treasury Solicitor*.

[PRIVY COUNCIL.]

J. C.* 1919 Dec. 8. MONTREAL TRAMWAYS COMPANY . APPELLANTS ;
AND
SAVIGNAC RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC, APPEAL SIDE.

Canada (Quebec)—Workmen's Compensation—Inexcusable Fault of Employer—Respondent Superior—R. S. Queb., 1909, art. 7325.

Art. 7325 of the Revised Statutes of Quebec, which forms part of the Workmen's Compensation Act of that Province, provides that is the accident which gives rise to a claim under the Act "was due to the inexcusable fault of the employer" the Court may increase the compensation beyond the limit of 2000 dollars provided by art. 7322:—

Held, that under art. 7325 the Court may increase the compensation upon proof that the accident was due to the inexcusable fault of a servant of the employer.

Grand Trunk Rly. Co. v. Poulin (1917) Q. R. 27 K. B. 141 approved.
Judgment of the Court of King's Bench affirmed.

* *Present* : VISCOUNT FINLAY, VISCOUNT CAVE, LORD SUMNER, and LORD PARMOOR.

APPEAL from a judgment of the Court of King's Bench for Quebec (December 29, 1917) affirming, with a modification, a judgment of Tellier J. at the trial.

J. C.

1919

MONTREAL
TRAMWAYS
COMPANY
v.
SAVIGNAC.

The respondent, a workman employed by the appellants, was injured by an accident to one of their tramcars in which he was riding in the course of his work. He sued the appellants in the Superior Court of Quebec to recover compensation under the Workmen's Compensation Act of that Province (R. S. Queb. 1909, arts. 7321 to 7348).

The respondent was awarded by both Courts in Quebec compensation beyond the limit of 2000 dollars provided by art. 7325, upon findings that the accident was due to the inexcusable fault of a servant of the appellants, and the view that art. 7325, which provides that the compensation may be so increased when the accident is "due to the inexcusable fault of the employer," applied.

The facts appear from the judgment of their Lordships.

1919. Nov. 13, 14, 17, 18. *Sir John Simon K.C.* and *H. Douglas* for the appellants.

G. Lawrence and *J.-P. Lanctôt* for the respondent.

The arguments were chiefly upon the evidence. The contentions with regard to the effect of art. 7325 sufficiently appear from the judgment of their Lordships.

Dec. 8. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal from a judgment of the Court of King's Bench of Quebec affirming with a modification the judgment of Tellier J., in an action for compensation under the Workmen's Compensation Act of Quebec (R. S. Queb. 1909, arts. 7321 et seq.).

The Act in question provides (by art. 7321) that accidents happening by reason of or in the course of their work to workmen, apprentices and employees engaged in certain occupations (including the repairing or maintenance of railways or tramways) shall entitle the person injured or his representatives to compensation ascertained in accordance with the Act. Art. 7322 declares that the person injured is to be entitled

J. C.
1919
MONTREAL
TRAMWAYS
COMPANY
v.
SAVIGNAC.

to a rent (or annuity) the amount of which is fixed with reference to the degree of incapacity produced by the accident and to the wages of the person injured ; but it provides that the capital of the grant or annuity to which the person injured is to be entitled shall not in any case, except in the case mentioned in art. 7325, exceed 2000 dollars.

Art. 7325 is as follows : “ No compensation shall be granted if the accident was brought about intentionally by the person injured. The Court may reduce the compensation if the accident was due to the inexcusable fault of the workman or increase it if it was due to the inexcusable fault of the employer.”

The question to be determined in this appeal is whether on the facts of this case the power given to the Court by art. 7325 to increase the compensation beyond 2000 dollars arose.

The facts of this case are shortly as follows : The appellants, the Montreal Tramways Co., own and work the tramways in the city of Montreal, and the respondent, Roméo Savignac was a plumber in their employ. At about nine o'clock in the evening of May 3, 1916, in consequence of a call to repair a broken electric cable at the corner of Ontario and Amherst Streets, an emergency wagon with the necessary materials was despatched from the appellants' premises. The wagon was of considerable weight, and was drawn by two horses. The driver of the wagon was a servant of the company named Pettigrew. One of the company's foremen, named Morin, sat by his side, and the respondent, who was to carry out the actual repairs required, had a seat at the back of the wagon. The wagon was driven at full speed, and apparently at a gallop, warning of its approach being given by means of a bell which was fixed near the driver, and was rung at intervals by Morin. It was a rainy evening, and the streets were slippery. In order to reach its objective it was necessary for the wagon to be driven eastwards down Dorchester Street, and across St. Denis Street. Dorchester Street is about twenty-one feet in width and, at the point where it approaches St. Denis Street from the west, has a slight incline. St. Denis Street is a wide and frequented thoroughfare, running on an incline from north to south, and carrying considerable traffic, including two lines of tramways

belonging to the company. Pettigrew, when approaching the point where Dorchester Street crosses St. Denis Street, made no attempt to check the pace of the wagon, but endeavoured to drive his horses at full speed across that thoroughfare. It is not surprising to find that his attempt resulted in a serious accident. At the moment when Pettigrew's wagon reached the junction of the two streets, a tramcar belonging to the appellant company, and driven by one Lalonde, was approaching the same point from the north. The evidence as to the speed at which this tramcar was travelling is conflicting, but it was found by both the Canadian Courts that it was being driven at an excessive speed, and certainly at a speed above the maximum of eight miles an hour allowed by law. Dorchester Street being a narrow street and the buildings at its junction with St. Denis Street being high, neither driver saw the other vehicle or had notice of its approach until it was too late (having regard to the speed at which they were travelling) to avoid a collision. The tramcar ran into the rear part of the wagon with such violence that the latter was driven a distance of 33 feet to the pavement on the east side of St. Denis Street. The car was stopped at a distance of about 20 feet from the point of contact. As a result of the collision, the respondent was thrown to the ground, fell under the wheels of the tramcar and suffered most serious injuries, both his legs having to be amputated.

These proceedings were thereupon brought by the respondent, claiming 15,000 dollars as compensation, and in the result, Tellier J. found that the driver of the emergency wagon had been guilty of "inexcusable fault," within the meaning of art. 7325, and increased the compensation to 14,192.50 dollars. On appeal to the Court of King's Bench that Court, by a majority (Cross J. dissenting) confirmed the decision but for reasons different from those which commended themselves to Tellier J., but reduced the compensation to 9000 dollars. The majority of the Court of Appeal appear to have thought that the great speed at which the emergency wagon was driven was in the special circumstances of the case excusable, owing

J. C.

1919

MONTREAL
TRAMWAYS
COMPANYv.
SAVIGNAC.

J. C.
1919
MONTREAL
TRAMWAYS
COMPANY
v.
SAVIGNAC.

to the fact that the broken cable was dangerous to life, and that it was usual in such cases to proceed at great speed to repair the damage. They therefore acquitted Pettigrew of "inexcusable fault," but they held that Lalonde, the driver of the tramcar, who was also a servant of the company, had been guilty of "inexcusable fault" in driving at an excessive speed, and accordingly that the company was liable for the damage. Against this decision the present appeal is brought. There is no cross-appeal in respect of the reduction of the amount of compensation, and nothing turns in this appeal on such reduction.

The first question to be determined is whether there was "inexcusable fault" on the part of the driver of the emergency wagon. It is plain from all the evidence that the wagon was driven at full speed, not only along Dorchester Street, but also at the moment when it was approaching St. Denis Street, at right angles, in order to cross it. At that moment the wagon was travelling at such a pace that it was plainly impossible for the driver, in the event of any tramcar or other vehicle passing along St. Denis Street at the time when he reached it, to check his horses and so avoid a collision. He drove recklessly into and across this frequented thoroughfare and trusted to good fortune to escape a serious accident. It is suggested that his action was excusable because it was desirable, in order to protect the public from serious and perhaps fatal injury from the broken cable, that the wagon should reach the scene of the breakdown at the earliest possible moment, and that it was therefore allowable for the driver to disregard all precautions and travel at the highest possible speed. Their Lordships are unable to accept that view. It was no doubt desirable that the wagon should proceed at the highest possible speed consistent with the safety of the public and of the occupants of the wagon itself; but this fact by no means justified the driver in throwing aside all prudence and putting the lives of others in imminent peril. On the contrary, the exceptional nature of the call made it his duty to take proper precautions to avoid an accident to the wagon, as it was plain that the result of such an accident might be to prevent him and his fellow

workmen from going to the repair of the cable ; and this is what, in fact, occurred. If Pettigrew had checked his wagon on approaching the crossing, so that he might be able, in the event of traffic approaching, to avoid a collision, he would have done his duty, and his journey would not have been delayed for more than a few seconds. It is unnecessary, and probably undesirable, to attempt a definition of the expression "inexcusable fault." Each case must be judged on its own facts, and their Lordships find no difficulty in saying that the conduct of Pettigrew in this instance fell within that description.

It has next to be determined whether the "inexcusable fault" of Pettigrew is to be attributed to the appellant company as his employers so as to give occasion for an increase of the maximum compensation under art. 7325 ; or, in other words, whether, according to the maxim "respondeat superior," the fault of the workman is, for the purpose of that article, to be attributed to the employer. This question was considered by the Quebec Court of Appeal in the recent case of *Grand Trunk Ry. Co. v. Poulin* (1), and was there decided in the affirmative. Their Lordships agree with that decision, and with the reasons given by the late Chief Justice, Sir Horace Archambeault. It is plain that the words "the employer," in art. 7325, cannot be confined to the employer personally ; for in that case a company, which can only act through its agents, would escape altogether from the effects of the article. Counsel for the appellant, recognizing this difficulty, suggested that according to the true construction of the article, the fault giving rise to an increase must be that of the employer or of some person or persons entrusted with the management of the concern. If this be the meaning of the article, then its effect is similar to that of art. 20 of the French law of April 9, 1898, which empowers the Court to increase the compensation if the accident is due to the inexcusable fault of the employer "ou de ceux qu'il s'est substitués dans la direction." Their Lordships are unable to accept this construction. It appears to them that if (as is admitted) the article must be read as extending to the act of some agents of the employer, there

J. C.

1919

MONTREAL
TRAMWAYS
COMPANYv.
SAVIGNAC.

(1) Q. R. 27 K. B. 141.

J. C.
1919
MONTREAL
TRAMWAYS
COMPANY
v.
SAVIGNAC.

is no sufficient reason why the ordinary rule under which a principal is made responsible for the acts of all his agents acting within the scope of their employment should not be applied. This construction is supported by the form of the enactment of 1909, in which there is introduced at the head of the article relating to workmen's compensation a reference to "art. 1053 and following,"—art. 1054 including the following provision: "He" (i.e., a person) "is responsible, not only for damage caused by his own fault, but also for that caused by the fault of persons under his control, and by things which he has under his care. . . . Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work in which they are employed."

Support is also given to the same conclusion (as pointed out by Archambeault C.J., in the case above cited) by art. 7334 of the code, which provides that "the person injured or his representatives shall continue to have in addition to the recourse given by this sub-section the right to claim compensation under the common law from the persons responsible for the accident other than the employer, his servants or agents."

For this article appears to deprive the injured workman of his common law remedy against a servant or agent of the employer whose misconduct or gross negligence may have been chiefly responsible for the accident, and it would be a hardship if that remedy were taken away without substituting a special remedy against the owner of the concern.

The result is that their Lordships are satisfied that Pettigrew, an agent of the appellant company, was guilty of an "inexcusable fault" giving rise to the accident, and that such fault is imputable to the appellant company and justifies an increase, under art. 7325, of the compensation payable under the Act. This being so, it becomes unnecessary to consider the further question whether the driver of the tramcar was also guilty of an "inexcusable fault"; for if any one of the company's servants was guilty of "inexcusable fault" giving rise to the accident, the liability of the company is clear. It is also

unnecessary to consider the question which was discussed by the Canadian Courts, whether in this case there was "inexcusable fault" on the part of those responsible for the management of the company's affairs; for having regard to the view which their Lordships have taken of the law of Quebec, that question becomes irrelevant.

For the reasons already given their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants : *Lawrence Jones & Co.*

Solicitors for respondent : *Jacobs & Greenwood.*

J. C.
1919
MONTREAL
TRAMWAYS
COMPANY
v.
SAVIGNAC.

[PRIVY COUNCIL.]

EMERSON-BRANTINGHAM IMPLEMENT } APPELLANTS;
COMPANY }

J. C.*
1919
Dec. 9.

AND

SCHOFIELD RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Judicial Committee—Practice—Special Leave to appeal—Failure to mention material Statute—Rescission of Order.

The appellants obtained from the Judicial Committee special leave to appeal from a judgment of the Supreme Court of Canada, without calling attention to a statute of the Province of Saskatchewan passed after the commencement of the action, but being material to the question whether special leave should be granted. Counsel for the petitioners did not know of the statute but the appellants themselves, from the nature of their business, must have done so. The respondent, after the appeal was in the list for hearing, petitioned that the order granting special leave might be rescinded :—

Held, that the granting of special leave to appeal should be rescinded and the appeal dismissed with costs.

PETITION by the respondent for the rescission of an Order in Council dated March 28, 1919, giving the appellants special leave to appeal from a judgment of the Supreme Court of Canada, dated October 8, 1918.

* *Present* : VISCOUNT FINLAY, VISCOUNT CAVE, LORD SHAW OF DUNFERMLINE, and LORD PARMOOR.

J. C. The respondent in November, 1914, sued the appellants
1919 in the Supreme Court of the Province of Saskatchewan to
EMERSON- recover damages for fraudulent misrepresentation and breach
BRANTING- of warranty in the sale to him of a traction engine. The agree-
HAM ment of sale was in the form of a printed contract ; it described
IMPLEMENT the engine as a 30-horse power gas traction engine, and
COMPANY provided that the appellants should send an operator to
v. erect and explain the working of the engine, and that it should
SCHOFIELD. be demonstrated after three days' trial that the engine, as
— erected, fulfilled certain conditions, including the development
 of 30-horse power. The contract further provided that the
 retention of the engine was to be a waiver of all other con-
 ditions or warranties, and that it was expressly agreed that
 the printed contract contained all the terms and conditions
 of the sale.

The jury, at the trial found that the respondent had been induced to enter into the contract, and afterwards to accept and retain the machine, by false representations made to him (not fraudulently) by the appellants' agent, that the respondent had made known to the appellants the purpose for which the engine was required, and that it was not reasonably fit for that purpose by reason of defective power. Judgment was given upon the findings for the sum of 4154 dollars, the price paid for the engine and certain expenses.

The Supreme Court in banco, by a majority of three judges to two set aside the judgment and dismissed the action.

Upon an appeal by the present respondent to the Supreme Court of Canada, that Court, by a majority of three judges to two, restored the judgment of the trial judge. The majority of the Court were of opinion that the respondent was entitled to judgment upon the ground that the engine was found not to be a 30-horse power engine, in accordance with the contract.

The present appellants petitioned for special leave to appeal to His Majesty in Council. The petition was heard by the Judicial Committee on March 28, 1919, being opposed by counsel on behalf of the respondent, and was granted. The appellants by their petition, and by the argument

at the hearing, relied on the contention that the case gave rise to a question which was of importance as it affected the construction of contracts in general, especially those relating to the supply of agricultural machinery to the large class of farmers. The petition did not disclose, and the counsel appearing upon the petition did not know, that after the commencement of the action the Legislature of Saskatchewan had passed the Act (Statutes of Saskatchewan, 1915, c. 28), assented to on June 24, 1915, the effect of which appears from the judgment of their Lordships.

The record in the appeal was lodged on March 28, 1919, and the appeal appeared in the list of appeals to be heard by the Judicial Committee during the sittings commencing upon October 31, 1919. On November 29, 1919, the respondent petitioned for the rescission of the Order giving special leave to appeal on the ground that their Lordships' attention had not been called to the statute above mentioned.

1919. Dec. 9. *C. E. Gregory K.C.* for the petitioner, the respondent. The Order in Council giving special leave to appeal should be rescinded on the ground that the appellants failed to draw attention to the statute of Saskatchewan, 1915, c. 28. That Act prevents the present question from being of any importance to farmers in the Province of Saskatchewan, and there are similar Acts in Alberta and Manitoba. The peculiar circumstances of the case and the findings of the jury render the question of no general importance. The good faith of counsel who appeared upon the appellants' petition is not impugned. It is, however, of the utmost importance that the material facts should be fully and accurately stated in petitions for special leave, since the time allowed by the rule before the hearing of the petition is not sufficient to send it to Canada.

Barrington Ward K.C. (with him *G. Lawrence*) for the appellants. The appellants' advisers were in complete ignorance of the statute of Saskatchewan until the present petition was lodged upon November 28 last—namely, after the appeal was in the list for hearing. The respondent was

J. C.
1919
EMERSON-
BRANTING-
HAM
IMPLEMENT
COMPANY
v.
SCHOFIELD.

J. C.
1919
EMERSON-
BRANTING-
HAM
IMPLEMENT
COMPANY
v.
SCHOFIELD.

represented by counsel at the hearing, and in any case should have called attention to the matter earlier. The present petition is too late. Although the questions involved are no longer of importance to farmers as a class, they are of general importance with regard to the law of contract, and there was a great conflict of judicial opinion in the Courts in Canada. The appellants have been allowed to incur the whole of the cost of preparing for the hearing of the appeal, and if the present petition is granted it should be upon terms as to costs.

The judgment of their Lordships was delivered by

VISCOUNT FINLAY. In this case the petition for special leave to appeal contained this averment in para. 6: "The question is of importance as it affects the construction of contracts in general, especially those relating to the supply of machinery, affecting the suppliers thereof, and the large class of farmers who are purchasers of agricultural machinery." Legislation was passed in Saskatchewan before that petition was presented with regard to the sale of farm implements, which prescribed a statutory form of contract, and required that any such contract should be in that statutory form. Sect. 21 contained the enactment to which attention has been drawn, providing that: "No contract, order, or security made or taken in connection with the sale of agricultural implements shall contain any statement to the effect that the vendor is not responsible for the representations of his agents, or any other language in anywise limiting or modifying the legal liability of the vendor as provided in this Act, or in the forms in the schedule hereto, and the insertion of any such statement, or the use of any such language, shall be of no effect." Then sub-s. 2 is: "Any breach of the provisions of this section shall render the contract, order, or security, void at the option of the purchaser." The existence of that legislation in the Province of Saskatchewan was a most material circumstance on the question whether special leave should be granted. It is obvious that the statement contained in para. 6 was likely to have some effect on their Lordships in determining whether

they should advise His Majesty that leave should be granted. The learned counsel applying for leave was in entire ignorance of the existence of this legislation, but the manufacturers, the petitioners, cannot possibly have been ignorant of the existence of this legislation. It was their business to know of such legislation, and they ought to have seen that those in England who were instructed to attend to the matter for them should have their attention directed to all the relevant facts, so that the case might not be presented to their Lordships in an incorrect or insufficient form. The statement which ought to have appeared as to the existence of this legislation might have made all the difference with regard to the granting or refusing of special leave. The Board think it probable that if the facts had been known at the time when the application for special leave to appeal was made to their Lordships such leave would not have been granted ; but there is no doubt whatever that the matter was of great importance, and one likely to influence the opinion of those who had to decide as to the advice that should be given to His Majesty as to granting or withholding special leave to appeal.

In these circumstances their Lordships will humbly advise His Majesty that the order granting the special leave to appeal should be rescinded and the appeal dismissed with costs.

Solicitors for petitioner (respondent): *Blake & Redden.*

Solicitors for appellants: *Lawrence Jones & Co.*

J. C.
1919
EMERSON
BRANTING-
HAM
IMPLEMENT
COMPANY
v.
SCHOFIELD.

J. C.*

[PRIVY COUNCIL.]

1919
—
Dec. 19.

MARSHALL'S TOWNSHIP SYNDICATE, }
LIMITED } APPELLANTS ;

AND

JOHANNESBURG CONSOLIDATED IN- }
VESTMENT COMPANY, LIMITED . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AFRICA.

South Africa—Legislative Power of Province—Municipal Rates—Ultimate Burden—Invalidation of Contracts—South Africa Act, 1900 (9 Edw. 7, c. 9, Imp.), s. 85 (vi.).

Ordinance No. 1 of 1906 of the Transvaal Province by s. 12 purports to invalidate any contract, existing or thereafter entered into, whereby the person primarily liable to pay a municipal rate made under that ordinance seeks to throw the liability for it on to a lessee, from or subsequently to himself, of the rated property :—

Held, that the power to make ordinances with regard to “municipal institutions” given to a Provincial Council by head (vi.) of s. 85 of the South Africa Act, 1909, includes the power to make an ordinance for levying rates and for providing on whom the ultimate burden of them should fall, and in so doing to deal with existing contracts.

APPEAL by special leave from a judgment of the Supreme Court of South Africa, Appellate Division (December 28, 1917), reversing a judgment of the Witwatersrand Local Division of the Supreme Court.

A special case stated by the parties in an action brought by the appellants against the respondents in the last-mentioned Court submitted for decision the question whether s. 12 of Ordinance No. 1 of 1916 of the Province of the Transvaal was or was not within the legislative power of the Provincial Council. The relevant facts and the terms of the section appear from the judgment of their Lordships.

The special case was argued before Ward J., who held that the section was *ultra vires*.

An appeal by the respondents to the Supreme Court of

* *Present* : VISCOUNT FINLAY, VISCOUNT CAVE, LORD SHAW OF DUNFERMLINE, LORD PARMOOR, and LORD WRENBURY.

South Africa was heard by Innes C.J. and Solomon and Maasdorp JJ.A., who reversed the decision, holding that the section in question was within the power of the Provincial Council under s. 85 of the South Africa Act, 1909. The proceedings upon the appeal are reported at S. A. L. R. [1917] A. D. 662.

J. C.

1919

MARSHALL'S
TOWNSHIP
SYNDICATE,
LIMITED
v.
JOHANNES-
BURG
CONSOLI-
DATED
INVESTMENT
COMPANY,
LIMITED.

1919. Dec. 15. *Hon. M. Macnaghten K.C.* and *P. F. Smith* for the appellants. Sect. 12 of Ordinance I. of 1916 was not within the competence of the Transvaal Council under c. 85 of the South Africa Act, 1909. Though there was an ancillary power under that section to enact by whom rates should be paid, there was no power to interfere with private contracts affecting the ultimate burden. The Union Parliament alone had power so to legislate. The power given by s. 85 (vi.) to make ordinances in relation to "municipal institutions" does not cover the ordinance now in question: *Attorney-General for Ontario v. Attorney-General for the Dominion*. (1) The matter could not be dealt with under head xii. unless the Governor was of opinion that it was of a merely local or private nature. No such opinion was expressed. [Reference was also made to *Smith v. Geldenhuys* (2) and *Middelburg Municipality v. Gertzen*. (3)]

Romer K.C. and *T. Mathew* for the respondents. The Provincial Legislature had an ancillary power under heads (i.) and (vi.) to enact upon whom the ultimate burden of the rates should fall. No valid distinction can be drawn between future and existing contracts for this purpose. The South Africa Act does not confer exclusive jurisdiction upon the Union Parliament in matters affecting property. The subject of rating, which is clearly included in the powers, necessarily involves interference with rights of property. So too under heads vii. and viii., there must be an ancillary power in a Provincial Council to interfere with rights of property. A Provincial Council, when exercising a legislative power specifically within one of the heads of s. 85 has an ancillary

(1) [1896] A. C. 348, 363, 364. (2) 1909 S. C. (T) 330.

(3) L. R. S. A. 1894, A. D. 544.

J. C. power to deal with property so far as is necessary to carry
1919 out the main object of the enactment.

MARSHALL'S
TOWNSHIP
SYNDICATE,
LIMITED
v.

JOHANNES-
BURG
CONSOLI-
DATED
INVESTMENT
COMPANY,
LIMITED.
—

Macnaghten K.C. replied.

Dec. 19. The judgment of their Lordships was delivered by

VISCOUNT FINLAY. This is an appeal by special leave from a judgment of the Appellate Division of the Supreme Court of South Africa. It raises a question of some importance as to the powers of a Provincial Council constituted under the South Africa Act, 1909 (9 Edw. 7, c. 9).

In the Union of South Africa established by that Act, the legislative power of the Union is vested in the Parliament consisting of the King, a Senate and a House of Assembly. By s. 59 of the Act Parliament has the power of making laws for the peace, order and good government of the Union. The Union comprises the Provinces of Cape of Good Hope, Natal, Transvaal and Orange Free State. In each Province there is a Provincial Council elected by the persons qualified to vote for the election of members of the House of Assembly of the Union (ss. 70 and 71). There is conferred upon the Provincial Council in each Province by s. 85 power to make ordinances in relation to thirteen classes of subjects enumerated in the section, of which (i.), (vi.), (xii.), and (xiii.) are as follows: "(i.) Direct taxation within the province in order to raise a revenue for provincial purposes. (vi.) Municipal institutions, divisional councils, and other local institutions of a similar nature. (xii.) Generally all matters which, in the opinion of the Governor-General in Council, are of a merely local or private nature in the province. (xiii.) All other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the provincial council."

The power of making ordinances does not exclude the power of legislation by Parliament, and any ordinance made by a Provincial Council is to have effect in the provinces as long and as far only as it is not repugnant to any Act of Parliament (s. 86). The Provincial Council may recommend to Parliament the passing of any law as to any matter in respect

of which the Council is not competent to make ordinances (s. 87). In order to be valid an ordinance must be assented to by the Governor-General in Council (s. 90), and when so assented to it has the force of law within the Province, subject to the provisions of the Act (s. 91).

The power of making ordinances in relation to "municipal institutions" includes the power of authorizing the making of rates for the purpose of such municipal institutions. Such bodies as municipal institutions cannot have any effective existence without rating powers, and it was admitted by the appellants that under s. 85 (vi.) ordinances may be made in relation to rating.

The question in the present case arises upon an ordinance of the Transvaal Province (No. 1 of 1916), amending the Local Authorities' Rating Ordinance, 1912, styled "the principal ordinance." The owner under this ordinance is the person primarily liable for the payment of rates, and s. 12 of the ordinance of 1916 provides as follows: "12. Any provision in a contract existing at the date of the taking effect of this Ordinance or hereafter entered into whereby any person primarily liable for payment of any rates imposed pursuant to this Ordinance in respect of any rateable property seeks to render any person interested under or subsequent to himself as lessee of such rateable property or any part thereof liable absolutely or conditionally to pay such rates or any part thereof in lieu or stead of himself shall be null and void."

Pursuant to this ordinance the Municipal Council of Johannesburg imposed a rate in respect of the half-year ended December 31, 1916, of 2*d.* in the pound. This rate has been paid by the plaintiffs, Marshall's Township Syndicate, Limited, as owners of eight stands in Marshall's Township within the municipality, which the respondents, Johannesburg Consolidated Investment Co., Ltd., hold under lease from the appellants. There was a separate lease for each stand. They were all in the same terms, and were executed in 1893. Each contained the following clause: "7. The lessee shall in respect of the said stand be bound to pay all such rates

J. C.

1919

MARSHALL'S
TOWNSHIP
SYNDICATE,
LIMITED

v.

JOHAN-
NESBURG
CON-
SOLIDATED
INVESTMENT
COMPANY
LIMITED.

J. C. and taxes as now are or may hereafter be levied thereon by
 1919 Government, or any Municipal, Sanitary, or other board or
 MARSHALL'S body having power to levy the same; and in case of a general
 TOWNSHIP rate or tax over the property of the lessors, the lessee shall
 SYNDICATE, be obliged to pay his pro rata share of the same."

v.
 JOHAN- The appellants having paid the rate sued the respondents
 NESBURG under this covenant. The defence was that the covenant
 CON- was invalidated by s. 12 of the Ordinance No. 1 of 1916 above
 SOLIDATED quoted. The facts were stated in the form of a special case
 INVESTMENT for the opinion of the Court, the question being whether the
 COMPANY, enactment contained in s. 12 of Ordinance No. 1 of 1916 is
 LIMITED. ultra vires of the Provincial Council.

The case was heard in the first instance by Ward J., who decided in favour of the plaintiffs, the lessors, holding that s. 12 was ultra vires, and that the Council had no authority to invalidate such a covenant for the transfer of the lessor's liability for rates to the lessee. This decision was reversed by the Appellate Division of the Supreme Court of South Africa, who held that the enactment was intra vires, and that the covenant sued on was therefore null and void.

It was conceded that the Provincial Council had power to make ordinances as to rates for municipal purposes, but it was contended that the authority of the Council was exhausted when they had provided for the immediate incidence of the rate by throwing upon the owner the liability to the municipal authority. It was urged that the immediate incidence of the rate is all that concerns the municipality, and that the Provincial Council in legislating as to municipal institutions can deal only with the immediate incidence of the rate, and has no authority to interfere with its ultimate incidence under any contract between lessor and lessee.

It appears to their Lordships that the appellants' contention on this point is not well founded. The scope of the authority of the Provincial Council cannot be so limited. Authority to deal with rating involves authority to deal with the question of its ultimate incidence as between several persons interested in the property rated. It may be considered to be in the interest of the municipality that the rate

should be borne by the owner, and that he should not be permitted to transfer the liability to the lessee. If the Council take this view it falls within the scope of their authority to give effect to it. It is a mistake to treat the interest of the municipality in rating as exhausted when provision is made for the payment of the rate to the municipal authority. The legislative body which has power to deal with rating has power to deal with its ultimate incidence as among those who have rights in the rateable subject, unless prohibited expressly or by implication from so doing. Of such prohibition there is not a trace in the statute creating these Provincial Councils and defining their powers. If, in the opinion of the Parliament of the Union, the power has been exercised in a manner which is inexpedient, the ordinance can at any time be repealed or modified by Act of Parliament.

It was urged that if s. 12 be valid it would also be within the power of the Provincial Council to make illegal an insurance by the lessor against the increase of rates, as this would involve a transfer of the burden to the underwriter. This was urged as a *reductio ad absurdum*. It is, however, obvious that it is one thing to deal with the incidence of a rate as between the interests in the land and another thing altogether to prohibit contracts of indemnity with underwriters or insurance companies who have no interest in the land, and the same observation applies to any collateral contracts in regard to rates with other parties, strangers to the land. The Provincial Council has confined itself to dealing with the incidence of the rate as between those interested in the land in respect of the rate as assessed, and this falls within its province in legislating as to municipal institutions. To forbid insurance and other collateral contracts in respect of rates would be quite another thing.

It was urged that s. 12 is retrospective, in that it deals with existing contracts, and that this is enough to render it invalid. Their Lordships are unable to accept this view. The fact that legislation is retrospective may be a strong argument on the inquiry whether it is just or expedient. But if power is given to the Provincial Councils to deal with

J. C.

1919

MARSHALL'S
TOWNSHIP
SYNDICATE,
LIMITED
v.
JOHAN-
NESBURG
CON-
SOLIDATED
INVESTMENT
COMPANY,
LIMITED.

J. C.
1919
MARSHALL'S
TOWNSHIP
SYNDICATE,
LIMITED
v.
JOHAN-
NESBURG
CON-
SOLIDATED
INVESTMENT
COMPANY,
LIMITED.

rating by ordinance, they have the same power of making any enactment relating thereto with retroactive effect as Parliament would have had, subject always to the power of Parliament to repeal or modify such ordinances. That the enactment is retrospective does not make it ultra vires.

For these reasons their Lordships entirely agree with the decision of the Appellate Division of the Supreme Court of South Africa.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Bircham & Co.*
Solicitors for respondents: *Dawes & Sons.*

[PRIVY COUNCIL.]

J. C.*
1919
Dec. 18.

TORONTO RAILWAY COMPANY . . APPELLANTS ;
AND
CORPORATION OF THE CITY OF }
TORONTO } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA AND THE SUPREME COURT OF ONTARIO.

Canada—Railways—Powers of Railway Board—Legislative Power of Dominion—Carrying Highway over Dominion Railways—Apportionment of Cost on Provincial Railway—Right of Appeal to Privy Council—Petition for Special Leave—Inaccuracy—Railway Act (R. S. Can., 1906, c. 37), ss. 46, 59, 237, 238—8 & 9 Edw. 7, c. 32 (Dom.), s. 5—British North America Act, 1867 (30 & 31 Vict., c. 3, Imp.), ss. 91, 92.

An appeal lies, by special leave, to His Majesty in Council, from an order of the Board of Railway Commissioners for Canada, but, having regard to the nature of the functions of that Board and the rights of appeal given by the Railway Act, leave should be granted cautiously and only under special circumstances.

A Provincial railway ran along a highway in Toronto which crossed on the level the tracks of three Dominion railways. Upon an application to the above-mentioned Board by the Toronto Corporation the Board made an order under the Railway Act, 1906, ss. 237, 238, as amended in 1909, authorizing the Corporation to carry the highway, with the tracks of the Provincial railway, over the tracks of the Dominion

* *Present*: VISCOUNT FINLAY, VISCOUNT CAVE, LORD SUMNER and LORD PARMOOR.

railways, and ordering that the Corporation should submit plans and complete the works by specified dates; the order further directed that the cost of construction should be borne in specified proportions by the Corporation and the four railway companies:—

Held (1.) that the order was mandatory and not merely permissive, and that consequently the Railway Board had power under s. 59 of the Railway Act to direct that the Provincial railway should contribute to the cost of construction; (2.) that that power being ancillary to the powers of the Railway Board with regard to Dominion railways the section was within the legislative power of the Dominion; (3.) that s. 46 of the Railway Act, under which the order was made a rule of the Supreme Court of Ontario, was *intra vires*.

British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co. [1914] A. C. 1067 distinguished.

Toronto Corporation v. Canadian Pacific Ry. Co. [1908] A. C. 54 applied.

It is incumbent upon the petitioners in any case in which special leave is applied for to see that the facts are correctly brought to the notice of the Judicial Committee, and if at any stage it is found that there has been failure to do so, the leave may be rescinded.

Observations in *Mussoorie Bank v. Raynor* (1882) 7 App. Cas. 321 affirmed.

Judgments appealed from affirmed.

APPEAL by special leave from orders of the Board of Railway Commissioners for Canada (July 3, 1909, and November 30, 1917), and an order of Middleton J. (Supreme Court of Ontario) refusing a stay of execution.

The effect of the orders appealed from, of which the order of July 3, 1909, was that substantially in question in the present appeal, and the relevant facts and statutory enactments appear from the judgment of their Lordships.

1919. Nov. 21, 24, 25. *Geary K.C.* and *Fairty* for the respondents. There are preliminary objections to the hearing of this appeal. There was no power to grant special leave to appeal from the order of the Railway Board. That Board is not a Court for purposes of appeal to the Privy Council; it succeeded the Railway Committee of the Privy Council of Canada, and its functions are of the same character and are almost wholly administrative. The principal order now appealed from was of that kind. No appeal from an order of the Railway Board has ever been entertained by the Judicial Committee. In *Canadian Pacific Ry. Co. v.*

J. C.

1919

TORONTO
RAILWAY
COMPANY
v.TORONTO
CITY.

J. C. *Toronto Corporation* (1), after objection, the appeal was heard
 1919 but on the ground that it was from the judgment of the
 TORONTO Supreme Court of Canada, certifying its opinion under s. 56,
 RAILWAY sub-s. 5. The second objection is that the petition upon which
 COMPANY special leave was obtained contained an inaccurate state-
 v. ment of the reasons for delay. The special leave should
 TORONTO be rescinded upon that ground: *Mussoorie Bank v.*
 CITY. *Raynor.* (2)

Sir John Simon K.C., D. L. McCarthy K.C. and Giveen
 for the appellants. There is a prerogative right to grant
 special leave to appeal to His Majesty in Council from orders
 of the Railway Board. That Board is a Court of record con-
 stituted by s. 10 of the Railway Act (R. S. Can., 1906, c. 37).
 No doubt some of the orders made by the Railway Board are
 purely administrative but when, as in this matter, it exercises
 the functions of a Court of record, an appeal lies by special
 leave: Judicial Committee Act, 1844 (7 & 8 Vict., c. 69), s. 1;
Canadian Pacific Ry. Co. v. Toronto Corporation. (3) The
 prerogative is excluded only in two ways, either by the
 Imperial Parliament setting up a Constitution excluding or
 limiting the right (e.g., s. 74 of the Commonwealth of
 Australia Constitution Act, 1900), or, as in the case of the
 South Africa Act, 1909, s. 106, by the Imperial Parliament
 empowering a local Legislature to enact that certain subjects
 shall be excluded. Although para. 19 of the petition may
 not have been strictly accurate, there is no substance in
 the second objection. No objection was taken on the
 appellants' printed case being filed.

[Their Lordships desired that the hearing of the appeal
 should proceed, judgment upon the preliminary objections
 being reserved.]

The appellants rely upon three grounds in support of their
 appeal. First, the Railway Board had no power under the
 Railway Act, as amended at the date of the order, to order
 the appellants to contribute to the cost of construction of
 the high level bridge: *British Columbia Electric Ry. Co. v.*

(1) [1911] A. C. 461.

(2) (1882) 7 App. Cas. 321.

(3) [1911] A. C. 461, 470.

Vancouver, Victoria and Eastern Ry. and Navigation Co. (1) is not distinguishable. As in that case the Railway Board merely authorized the corporation to carry out the work proposed. Nor was the order authorized by sub-s. 3 of the amended s. 238 enacted by s. 5 of 8 & 9 Edw. 7, c. 32 (Can.). In that sub-section the words "the company" and "person" refer to sub-s. 1 and mean the company applying and the person aggrieved. Secondly, the appellant railway is a purely Provincial undertaking. If the order upon them to contribute purports to be authorized by the Railway Act that Act is to that extent ultra vires of the Dominion Parliament having regard to ss. 91 and 92 of the British North America Act, 1867. An ancillary power to deal with undertakings within the legislative ambit of a Province is to be implied only where it is "necessarily incidental" to the power confided to the Dominion Parliament: *City of Montreal v. Montreal Street Ry.* (2) Thirdly, s. 46 of the Railway Act, so far as it purported to provide that the order might be made a rule of the Supreme Court of Ontario and should (not might) be enforced as such, was ultra vires having regard to head 14 of s. 92 of the British North America Act, 1867.

Geary K.C. and *Fairty* for the respondents. The Railway Board had power to order the appellants to contribute under the amended s. 238, sub-s. 2 of the Railway Act, 1906. But it is not necessary to establish that since, the order being an order under the Act, there was power under s. 59. The appellants were "interested in or affected by" the order within the meaning of that section: *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co.* (1) is distinguishable. The order there under consideration was of a purely permissive character, the works being in the nature of a municipal improvement. That was the basis of the decision. Here the order was made for the avoidance of danger to the public, and was mandatory with regard to the completion of the works by a specified date. The facts are substantially identical with those in *Toronto*

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

(1) [1914] A. C. 1067.

(2) [1912] A. C. 333, 344.

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

Ry. Co. v. City of Toronto. (1) The Supreme Court in that case rightly distinguished the decision of the Privy Council in 1914; a petition to the Privy Council for special leave to appeal was rejected. The power to make the order was ancillary to the powers of the Railway Board with regard to the Dominion railways which were to be crossed: *Toronto Corporation v. Canadian Pacific Ry. Co.* (2); *City of Montreal v. Montreal Street Ry.* (3); *City of Toronto v. Grand Trunk Ry. Co.* (4) The provisions of the Railway Act authorizing the order were therefore intra vires. There is no substance in the objection relative to s. 46; further, there was no appeal from the making of the order a rule of Court. The practice of the Supreme Court of Ontario in the matter is well settled: *In re Dominion Cold Storage Co.* (5)

Sir John Simon K.C. in reply. The facts of this case bring it within the decision of the Privy Council in 1914 rather than within that of the Supreme Court of Canada in 1916. If not, the latter decision was erroneous. The directions to file plans and to complete the work by specified dates were merely the terms upon which the permission was given; they do not prevent the order from being permissive in character.

Dec. 18. The judgment of their Lordships was delivered by

VISCOUNT FINLAY. This is a case in which special leave has been obtained by the Toronto Railway Company to appeal against three orders. The first of these orders was made on July 3, 1909, by the Railway Board for Canada and directed that the Toronto Railway Company should bear a certain proportion of the costs of construction of a bridge which the Corporation was by the order authorized to construct for the purpose of carrying the highway of Queen Street East, Toronto, with the tracks thereon of the Toronto Railway Company, a Provincial railway, over the tracks of the Canadian Pacific Railway Company, the Grand Trunk Railway Company, and the Canadian Northern Ontario

(1) (1916) 53 Can. S. C. R. 222.

(3) [1912] A. C. 333, 344.

(2) [1908] A. C. 54.

(4) (1906) 37 Can. S. C. R. 232.

(5) (1898) 18 (Ont.) Practice Reports, 68, 72.

Railway Company, all three Dominion railways. The second order was dated November 30, 1917, and by it the Railway Board directed that the Toronto Railway Company should make a payment of 80,000 dollars on account towards the cost of construction. The third order appealed against was dated February 4, 1918, and was made by Middleton J., of the Supreme Court of Ontario, refusing a stay of execution against the Toronto Railway Company.

It was urged on behalf of the appellants that the order for payment of part of the costs of construction was not authorized by the Railway Act. On behalf of the respondents, the Corporation of Toronto, it was contended, first, that special leave to appeal from orders of the Railway Board cannot be granted; secondly, that the order for special leave to appeal in the present case ought to be rescinded, on the ground that the relevant facts were not correctly stated in the petition; and, thirdly, that the order for payment of part of the costs of construction made against the Toronto Railway Company was authorized by the Railway Act and could not be impeached.

Queen Street East is a public highway in Toronto running east and west, and along it runs the appellants' railway. It was crossed on the level by the railways of the Canadian Pacific, the Grand Trunk, and the Canadian Northern Ontario Railway Companies. On June 20, 1905, an application was made by the Toronto Corporation to the Railway Board under s. 186 of the Railway Act of 1903, for an order permitting the Corporation to construct a high level bridge over the tracks of the railways crossing Queen Street East, and for an order determining the proportions in which the costs of construction should be borne by the railways and other parties interested. This application was served on the several railway companies, one of which was the Toronto Railway Company, the present appellants. The application was heard in April, November and December, 1906, by the Railway Board. The Toronto Railway Company appeared by counsel before the Board. On December 12, their counsel admitted the jurisdiction of the Board to order the company

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

J. C. to contribute a part of the costs as a party interested, but
1919 later in the day he stated that this concession was made only
TORONTO RAILWAY COMPANY for the purpose of the argument in case some other remedy
should be open to him.

v.
TORONTO CITY. On July 3, 1909, the Railway Board made the principal
order appealed against. It is in the following terms :—
“ In the matter of the application of the City of Toronto,
hereinafter called the ‘applicant,’ for authority to build a
high level bridge over the Don Improvement and the tracks
of the Canadian Pacific Railway Company, the Grand Trunk
Railway Company, and the Canadian Northern Ontario
Railway Company, at Queen Street East, in the City of
Toronto : Upon hearing evidence and what was alleged by
counsel for the applicant, the Toronto Street Railway Com-
pany, the Canadian Pacific Railway Company, the Grand
Trunk Railway Company, and the Canadian Northern
Ontario Railway Company—

“ It is ordered : 1. That the applicant be, and it is hereby,
authorized to construct a bridge to carry the highway and the
tracks of the Toronto Street Railway Company over the
tracks of the Canadian Pacific Railway Company, the Grand
Trunk Railway Company, and the Canadian Northern
Ontario Railway Company, where such tracks cross Queen
Street East, in the City of Toronto. 2. That the applicant
submit detail plans of the proposed bridge and approaches
thereto for the approval of an engineer of the Board by
September 15, 1909, and construct the bridge ready for traffic
by July 1, 1910. 3. That the cost of the construction of the
bridge and approaches and the land damages, if any, shall
be paid as follows : The City of Toronto, 15 per cent. ; the
Toronto Street Railway Company, 15 per cent. ; the Canadian
Pacific Railway Company, 35 per cent. ; the Canadian
Northern Ontario Railway Company, 25 per cent. ; and
the Grand Trunk Railway Company (Belt Line), 10 per cent.
4. That, upon completion, the said bridge shall be maintained
by the applicant ; the cost of such maintenance, with the
exception of the cost of the maintenance of the roadway
and sidewalks on said bridge and approaches, shall be paid

as follows : By the City of Toronto, 70 per cent. ; by the Canadian Pacific Railway Company, 10 per cent. ; by the Canadian Northern Ontario Railway Company, 10 per cent. ; by the Grand Trunk Railway Company, 10 per cent. ; the cost of the maintenance of the roadway and sidewalks on said bridge and approaches shall be borne entirely by the applicant. 5. That any matter in dispute between any of the parties hereto with regard to the carrying out of the provisions of this order, shall be determined by the chief engineer of the Board."

On September 10, 1909, the Toronto Railway Company gave notice of application to the Railway Board, under s. 56, sub-s. 3, of the Railway Act, 1906, for leave to appeal to the Supreme Court, on the ground that, as a matter of law, the company should not have been ordered to pay any portion of the cost of construction. This application was on September 15 refused by the Railway Board. On September 21 the company applied, under s. 56, sub-s. 2, of the Railway Act, for leave to appeal to the Supreme Court on the question whether there was jurisdiction to make the order. This application was refused by Duff J., and no attempt was made to get leave to appeal from this refusal.

The second order appealed against, for payment to be made on account, was not made till November 30, 1917, and is subsidiary to the principal order of July 3, 1909 ; it was made a rule of the Supreme Court of Ontario under s. 46 of the Railway Act, 1906, in January, 1918. The third order appealed against—that of February 4, 1918—is a refusal to stay execution.

A petition for special leave to appeal was presented in July, 1918, nine years after the date of the principal order appealed against. The petition for special leave contains the following paragraph, which has reference to the great lapse of time which had taken place :—" 19. That since the year 1909 the whole question involved has been in dispute between your petitioners and the City of Toronto ; that until the year 1917 your petitioners were unaware whether and to what extent the City of Toronto would finally press

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

for payment of the expenses of the said bridge by your petitioners; that after the judgment given in the case of the *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co.* (1) upon appeal to Your Majesty in Council (the reasons for which judgment, in your petitioners' submission, show that there is no jurisdiction in the said Board to order your petitioners to pay such expenses) your petitioners hoped that no further attempt would be made by the City of Toronto to obtain an order for such payment; that matters remained still in dispute pending any attempt by the City of Toronto to get a final order, and, further—pending the settlement of all outstanding disputes (of which there are several) upon the expiration of your petitioners' franchise in the year 1921; but that by the procedure now adopted the City of Toronto have sought to obtain a very large sum of money from your petitioners, to payment of which your petitioners submit the City of Toronto are not entitled."

At the opening of the case Mr. Geary made a preliminary objection to the jurisdiction, decision on which was reserved until the case should have been heard. Mr. Geary contended that it was not competent to grant special leave to appeal to His Majesty in Council direct from the Railway Board. Their Lordships, after full consideration, have arrived at the conclusion that the Railway Board is not exempt from the prerogative of the Crown to grant special leave to appeal. The Railway Board is not a mere administrative body. It is a Court of record, and it may be of importance that in some special cases its decisions on points of law should be taken on special leave direct to His Majesty in Council. The prerogative of granting special leave to appeal is, *prima facie*, applicable to all Courts in His Majesty's Dominions, and their Lordships cannot see any ground which would warrant them in holding that the Railway Board is exempt from the general rule. At the same time, their Lordships must add that, in their opinion, this is a power which, in the case of the Railway Board, should be very sparingly

(1) [1914] A. C. 1067.

exercised. There is by the Railway Act a general power conferred on the Governor in Council, either on his own motion or upon petition, to vary or rescind any order of the Railway Board (s. 56). By the same section there is given an appeal to the Supreme Court on any point of law, leave being obtained from a judge of that Court, and provision is also made for an appeal to the Supreme Court, with leave of the Railway Board, on any question of jurisdiction. Having regard to these provisions, it would appear that the power of granting special leave to appeal from orders of the Railway Board should be cautiously exercised and only under special circumstances.

Mr. Geary further contended that the special leave in the present case ought to be rescinded, on the ground of inaccuracy in the statements made in para. 19 of the petition. This point will be dealt with at a later stage of this judgment.

Their Lordships proceed to consider the case upon its merits. It depends upon the terms of the Railway Act, and the relevant enactments are contained in the Act of 1906, with the amendments introduced by the Railway Act of 1909. The most material sections are s. 59 and ss. 237 and 238, both of which latter are amended by the Act of 1909.

Sect. 59, by sub-s. 1, provides in effect that when the Board, in the exercise of any power vested in it by that Act or by the special Act, by order directs any works it may order by what company, municipality or person interested in or affected by such order the same shall be constructed. Sub-s. 2 provides that the Board may order by whom, in what proportion, and when, the expenses of such works shall be paid.

This section applies to every case in which the Board by any order directs works, and gives it power to "order by what company, municipality or person interested in or affected by such order" they shall be constructed, and to order by whom the expenses of construction shall be paid. There is not in sub-s. 2 any definition of the class of persons who may be ordered to pay such expenses, but it seems clear that sub-s. 2 must be read with reference to the immediately

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

preceding provision and that such an order may be made only on a company, municipality or person interested in or affected by the order directing the works. It appears to their Lordships that where the Board, in the exercise of its statutory powers, makes such an order as was made in the present case on July 3, 1909, that is a case in which the Board by order directs works to be constructed within the meaning of s. 59. It would be reading the words "by any order directs" in that section too strictly if they were held to apply only to cases in which the order takes the form of a command for the execution. They are satisfied by an order of the Board giving authority for the construction to a municipality or other applicant and containing directions with regard to it such as are contained in this order of July 3. It follows that in such a case the Board may order by what company, municipality or person interested in or affected by the order directing the works the expenses should be paid.

Where a responsible public body applies for leave to construct the works, no formal command for their execution is wanted; leave is enough, such as was granted by cl. 1 of the present order. But cl. 2 orders the submission of detailed plans by September 15, 1909, and that the bridge be ready for traffic by July 1, 1910. The applicant takes the leave with the orders in cl. 2, and these orders might be enforced by the Board. To treat completion by July 1, 1910, as merely a condition on which the leave was granted is to ignore the fact that completion by that date is in terms ordered, and such a construction would leave the Board and the public with no redress except the cancelling of the leave. The same observations apply to the filing of the plans.

It is impossible to treat this order as merely permissive; it is mandatory.

Sects. 237 and 238, as they stood in the Act of 1906, made provision for the case of a railway crossing a highway, or vice versa, but did not contain any provision as to the payment of expenses of the works. Sect. 59 would apply to the case of any order made under either of these sections,

as being made under the Act of which s. 59 forms part. Sects. 237 and 238 are, however, repealed by the Act of 1909 (8 & 9 Edw. 7, c. 32), and replaced by the new ss. 237 and 238 as they stand in the Railway Act.

The new s. 237 deals with the case of an application for leave to construct a railway upon, along or across a highway, or a highway along or across a railway. It provides for the submission to the Board of plans and profiles, and empowers the Board by order to grant the application on such terms as it thinks proper, or to order that the railway be carried over, under or along the highway, or vice versa, or that there should be a diversion of either, or that protective measures, by employment of watchmen or the execution of other works, be taken to diminish the danger of the crossing.

The new s. 238 deals in its first sub-section with the case of a railway already constructed upon, along or across any highway, and provides that in such case the Railway Board may, of its own motion, or on application on behalf of the Crown or any municipality or other corporation, or any person aggrieved, order the company to submit plans to the Board, and may make orders such as are authorized by s. 237 for the avoidance of danger. Sub-s. 3 contains a provision for the payment of the expenses which is applicable to orders alike under s. 237 and s. 238. The words of this sub-section should be quoted: "Notwithstanding anything in this Act or in any other Act, the Board may, subject to the provisions of s. 238a of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person, in respect of any order made by the Board under this or the preceding section, and such order shall be binding on and enforceable against any railway company, municipal or other corporation, or person named in such order."

Whatever be the construction of this sub-section, there is nothing in it to put an end to the application of s. 59 to orders under ss. 237 and 238. The power given by s. 59 applies in the case of any order made by the Board in the exercise of any power vested in it by the Railway Act. As ss. 237 and

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

238 are part of the Railway Act, it follows that s. 59 applies to orders made under them. The order is, therefore, good by virtue of s. 59, and it is unnecessary to consider how far it might also be supported under s. 238, sub-s. 3.

The Toronto Railway Company's lines ran along the surface of Queen Street East and crossed on the level the lines of the three Dominion railway companies. The order of the Railway Board involved carrying the highway, with the lines of the Toronto Railway Company upon it, by a bridge over the lines of the Dominion railways. The Toronto Railway Company was therefore beyond all question interested in or affected by the works ordered. How far the Toronto Railway Company benefited by these works, and what proportion of the costs it was fair to throw upon that company, was entirely a matter for the Railway Board to decide.

The first objection raised by the appellants to the order as to costs was that the railway of the Toronto Railway Company is a Provincial railway, and that any enactment giving power to throw upon it the costs of works would be ultra vires the Dominion Parliament. Reference was made to s. 92 of the British North America Act, which gives the Provincial Legislature the exclusive right of making laws with regard to local works or undertakings not declared by the Parliament of Canada to be for the general advantage of two or more of the Provinces. It was also urged that the Provincial railway company was not interested in or affected by the works in question. Both of these objections are answered by the decision of this Board in the case of *Toronto Corporation v. Canadian Pacific Ry. Co.* (1) The order of the Railway Committee of the Canadian Privy Council to which that case relates had been made in 1891, under the Dominion Railway Act, 1888. It directed gates and watchmen at certain level crossings on the Canadian Pacific Railway within the area of the municipality of Toronto, and provided that the cost should be borne, as to one half, by the Corporation. The Toronto Corporation

(1) [1908] A. C. 54, 59.

paid their annual contributions under the order down to 1901. They then refused further payment, and the action was brought by the Canadian Pacific Railway Company to enforce it. The sections under which the order was made were ss. 187 and 188 of 51 Vict., c. 29 (the Railway Act of 1888). Sect. 187 gave the Railway Committee power in the case of level crossings to direct works or protection by a watchman or by a watchman and gates. Sect. 188 was as follows: "The Railway Committee may make such orders, and give such directions respecting such works and the execution thereof, and the apportionment of the costs thereof, and of any such measures of protection, between the said company and any person interested therein, as appear to the Railway Committee just and reasonable."

It was decided in that case by the judgment of this Board, affirming the Canadian Courts, that the enactment throwing the expenses in part on parties interested was *intra vires* of the Canadian Parliament. Lord Collins in delivering the judgment said that there was nothing *ultra vires* in the ancillary power conferred by ss. 187 and 188 to make an equitable adjustment of the expenses among the parties interested. Corporations interested in such works are subject to the legislation of the Dominion Parliament as to their cost though generally subject only to the Provincial Legislature. On the second contention, namely that the Provincial railway company was not a person interested, Lord Collins, after pointing out that the word "person" includes a municipality, said: "And their Lordships fully concur in the conclusion and reasoning of Meredith J.A., in the Court below, that in this case the municipality was a person interested." The municipality was interested in respect of its guardianship of the safety of the public, and the interest of the Toronto Railway Company in the present case is obvious on the mere statement of the facts.

The two sections on which the decision in the Toronto case in 1908 proceeded were replaced in the Railway Act of 1903 by ss. 186, 187 and 47 of that Act, and in the Act of 1906, originally and as amended in 1909, by ss. 237 and 238

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

and s. 59. The reasoning of the judgment in the case of 1908 is just as applicable to cases arising under these substituted enactments. The contention of the appellants that it is ultra vires of the Dominion Parliament in legislating for a Dominion railway to make incidental provision affecting Provincial municipalities or railway companies, appears to their Lordships to be based on no principle. It is not a case in which there is any meddling by the Dominion Parliament with the working of a Provincial railway company; there is only a provision that it shall bear cost of works in relation to the Dominion railways which affected the Provincial line. To hold that such a provision was ultra vires would give rise to very great difficulty in dealing with railways by legislation under any scheme of federation.

The authority chiefly relied upon by the appellants was the judgment of Lord Moulton in *British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co.* (1), reversing a decision of the Supreme Court of Canada. (2) In that case there were certain streets in Vancouver which were crossed on the level by the lines of the Vancouver, etc., Railway Company, a Dominion company. On application made by the Corporation of the City of Vancouver, the Railway Board, on October 14, 1912, made an order authorizing the applicant to carry these streets across the tracks of Vancouver, etc., Railway Company by means of overhead bridges, as shown on the plans filed with the Board (detailed plans to be submitted). There is nothing in this order, as in the case now under consideration, directing that the works should be completed by a particular date. In this respect the order in the Vancouver case stands in marked contrast to the terms of the order in the present case. The lines of the British Columbia Electric Railway Company, a Provincial railway, ran along certain of these streets, crossing the Dominion Railway Company's lines, before the bridge was constructed, on the level, and afterwards by the bridge. The order contained a direction that part of the cost of constructing the bridge was to be paid by the Electric

(1) [1914] A. C. 1067.

(2) (1913) 48 Can. S. C. R. 98.

Railway Company, and on appeal by the Electric Railway Company from this part of the order, it was held by the Supreme Court of Canada that it was *intra vires* (Duff J. and Brodeur J. dissenting).

In the Judicial Committee it was held on appeal to be bad as regards the directions as to the cost, and the ratio decidendi appears from the judgment. Their Lordships would particularly refer to the following passages in the judgment delivered by Lord Moulton: "Their Lordships entirely agree with the remarks of Duff J. as to the ground and reason of the application of the Corporation to the Railway Board. Referring to the statement made at the hearing by Mr. Baxter, who represented the Corporation, he says: 'Mr. Baxter's statement makes it quite clear that the occasion for the application arose from the necessity of determining the permanent grade of these four streets. It was a question, he said, whether on the one hand the grade was to be elevated, or on the other, the grade was to be made to conform to the grade of the railway tracks and level crossing established. It was necessary to have the matter disposed of because people were applying for permits to build upon these streets, and these could not be granted owing to the inability of the municipality to give the grade of the streets. The council preferred the former of the two alternative courses because they recognized that the street grades were too low and must inevitably be raised.' It follows, therefore, that the application was a matter between the Corporation and the railway company alone. (1) . . . It is sufficient to point out that the order is not made under s. 59 nor does it come within its provisions. It does not direct that any work should be done. It is an order of a purely permissive character granting a privilege to the corporation which they may exercise at the expense of a third party, and it leaves it to the corporation to decide whether they shall avail themselves of it or not. The provisions of s. 59 relate to a wholly different class of cases." (2)

Lord Moulton treats the order of the Board as merely

(1) 1914 A. C. 1067, 1074.

(2) *Ibid.* 1075.

J. C.

1919

TORONTO
RAILWAY
COMPANY

v.
TORONTO
CITY.

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

permitting the Corporation to make a municipal improvement in the grading of the streets. The order is not regarded as proceeding on any consideration of danger arising from the level crossing or as having anything to do with the railways as such. The matter was treated as one merely of street improvement for which a permissive order was given by the Railway Board. The keynote of the judgment is struck in one sentence: "It follows therefore that the application was a matter between the Corporation and the railway company alone." The judgment proceeds on the principle that the assent of the Board was asked merely because the viaduct would cross the Dominion railway, and that this gave no jurisdiction to make the Electric Company pay the costs of construction. The order was treated as not falling within either s. 59 or s. 238 of the Railway Act; indeed, the latter section is not even mentioned in the judgment.

In *Toronto Ry. Co. v. City of Toronto* (1) the Supreme Court had to deal with a case in which the tracks of the Toronto Railway Company in Avenue Road, Toronto, crossed the tracks of the Canadian Pacific Railway Company on rail level. The chief engineer of the Railway Board had reported to the Board that the crossing was dangerous, and the Board of its own motion ordered that the street be carried under the Canadian Pacific Railway Company's tracks. It was held that the order was made for the protection, safety and convenience of the public; that the Toronto Railway Company was a company interested in or affected by the order, and that the Board had jurisdiction to direct that it should pay a portion of the cost of the subway. The Chief Justice treated the order as being made under the provisions of s. 238. He pointed out that the substantial reason for the order was the elimination of dangerous crossings, and that it could make no difference that occasion was taken for abolishing these crossings when the separation of grades on a neighbouring street was decided upon, and said that the facts were wholly different from those in the Vancouver case. Davies J. said that the controlling ground for the order was the safety

(1) 53 Can. S.C.R. 222.

and protection of the public, while in the Vancouver case it was merely a matter of street improvement. Anglin J. said that the Judicial Committee in the Vancouver case viewed the matter as one of street improvement merely, in which the municipal corporation and the Dominion Railway Company were alone concerned.

In the present case the order appears to their Lordships to be in substance mandatory, and to be made for the protection and convenience of the public with regard to the crossings of the railways. What was done may have improved the streets, but it was certainly not a mere matter of street improvement. Their Lordships therefore think that the Vancouver case is distinguishable from the present.

Their Lordships are of opinion that s. 46 of the Railway Act, 1906, is not ultra vires, and that the objection taken to the procedure followed in making the order a rule of Court fails. On this point they are content to refer to the judgment of Middleton J.

For these reasons, in the opinion of their Lordships, the appeal fails on the merits.

There is, however, another aspect of the case on which it appears desirable that some observations should be made.

The substantive order against which leave was obtained to appeal was made so long ago as July 3, 1909. The orders of November 30, 1917, and February 4, 1918, were merely subsidiary. The fact that so long a period had elapsed since the order was made was one which would militate strongly against the granting of special leave. It must have been to meet this difficulty that para. 19 was introduced into the petition. It appears to their Lordships that the allegations in that paragraph are not borne out by the documentary evidence to which their attention was drawn by the counsel for the respondents.

There is a correspondence between the corporation and the Toronto Railway Company set out in the respondents' appendix of documents. [The judgment after referring to the various material letters and documents proceeded as follows :]

J. C.

1919

TORONTO
RAILWAY
COMPANYv.
TORONTO
CITY.

J. C.
1919
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

Para. 19 of the petition for special leave opens with the statement "that since the year 1909 the whole question involved has been in dispute between your petitioners and the City of Toronto." Their Lordships cannot find that before the answer by the appellants on August 13, 1915, to the respondents' application to the Railway Board dated July 21, 1915, the appellants ever disputed their liability for their share of the expenses of construction after the dismissal of their applications for leave to appeal to the Supreme Court in September, 1909. On the contrary, the correspondence proceeds on the footing of their liability. Para. 19 goes on to allege: "that until the year 1917 your petitioners were unaware whether and to what extent the City of Toronto would finally press for payment of the expenses of the said bridge by your petitioners." Their Lordships are unable to find anything in the correspondence that could lead the petitioners to doubt that the City would press for payment. Indeed, the liability of the petitioners is constantly asserted and there are many letters pressing for payment.

It is incumbent on the petitioners in any case in which special leave be applied for to see that the facts are correctly brought to the notice of the Board, and if at any stage it is found that there had been failure to do so, the leave may be rescinded.

In the present case no reflection is made upon the good faith of those who represented the Toronto Railway Company on the application for special leave. The terms of para. 19 of the petition would appear to be due to ignorance of the facts without any intention to mislead. But it is of great importance that the rule laid down by Lord Kingsdown in *Mohun Lall Sookul v. Bebee Doss* (1) should be maintained. He said: "Where there is an omission of any material facts, whether it arises from improper intention on the part of the Petitioner, or whether it arises from accident or negligence, still the effect is just the same, if this Court has been induced to make an order, which if the facts were fully

(1) (1861) 8 Moo. I. A. 193, 195.

before it, it would not, or might not, have been induced to make."

Their Lordships desire to express their agreement with the observations made in the judgment in *Mussoorie Bank v. Raynor*. (1) Lord Hobhouse, in delivering the judgment of the Board, said: "At the same time their Lordships desire it to be distinctly understood that an Order in Council granting leave to appeal is liable at any time to be rescinded with costs, if it appears that the petition upon which the Order was granted contains any misstatement, or any concealment of facts which ought to be disclosed. In this case, if their Lordships had any reason to think that there were intentional misstatements in the petition, they would at once rescind the order and dismiss the appeal. But they do not think there was any intention to mislead. . . . Still, if there has been a material misstatement, it is not sufficient to clear the case of bad faith." Lord Hobhouse then quoted the passage from Lord Kingsdown which has been cited above, and, after examining the facts of the case before him, said: "Their Lordships are of opinion that the petition is very faulty, and that due care was not shown in its preparation; but on examining the grounds for asking leave to appeal, they do not think that any different conclusion would or could have been arrived at if the strictest accuracy had been observed." In that case, therefore, the appeal was heard and allowed, but without costs.

In that case the misstatement related only to one of three grounds, the other two being sufficient to justify leave. In the present case para. 19 is addressed to the delay in presenting the petition which, if unaccounted for, might, and probably would, have led to the refusal of leave.

Owing to the course which the case has taken it is not necessary now to deal further with this point, but their Lordships think it proper to say that, if the occasion had arisen for deciding on this objection, it would have been a matter for their grave consideration whether the leave should not be rescinded, however innocent the misrepresentation.

(1) 7 App. Cas. 321, 328, 330.

J. C. Their Lordships will humbly advise His Majesty that the
1919 appeal should be dismissed with costs.

TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

Solicitors for appellants : *Charles Russell & Co.*

Solicitors for respondents : *Freshfields & Leese.*

[PRIVY COUNCIL.]

J. C.* TORONTO RAILWAY COMPANY . . APPELLANTS ;
 1920
 Jan. 20. CORPORATION OF THE CITY OF } RESPONDENTS.
 TORONTO }
 ATTORNEY-GENERAL FOR THE PRO- }
 VINCE OF ONTARIO } INTERVENER.

AN APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.

Canada (Ontario)—Legislative Power of Province—Penalty—Provincial Railway Board—Enforcement of Orders—Construction of Statute—Ontario Railway Act (R.S. Ont., 1914, c. 185), s. 260 a.—British North America Act (30 & 31 Vict. c. 30, Imp.) s. 92, head 15.

The appellants, who operated a street railway in Toronto under an agreement with the respondent corporation, were required by an order made by the Railway and Municipal Board of Ontario on February 27, 1917, to place an additional 100 cars in operation by January 1, 1918. Sect. 260 a, added to the Ontario Railway Act (R.S. Ont., 1914, c. 185) by an Act passed on March 26, 1918, provided that the above-mentioned Board, for the purpose of enforcing compliance with any order of the above character made by them upon a railway company, might order the company to pay to the corporation of the municipality in which it operated a penalty not exceeding 1,000 dollars a day for non-compliance. On April 19, 1918, the appellants having supplied no additional cars, the Board, acting under s. 260 a, ordered them to pay to the respondent corporation 1,000 dollars per day from March 27 to the date of the order.

Held, that s. 260 a above mentioned was intra vires of the Provincial Legislature, but that the order made was not authorized by the section since it was an order not for enforcing compliance with the order of 1917, but for punishing the appellants for a past breach of its requirements.

Judgment of the Appellate Division reversed.

* *Present*: VISCOUNT HALDANE, VISCOUNT CAVE, and LORD SHAW OF DUNFERMLINE.

APPEAL by special leave from a judgment of the Supreme Court of Ontario, Appellate Division (December 20, 1918), affirming an order of the Ontario Railway and Municipal Board (April 19, 1918).

The order of the Ontario Railway and Municipal Board was made under the authority of s. 260 a of the Ontario Railway Act, added by 8 Geo. 5, c. 30, s. 4 (Ont.), and ordered the appellant railway company to pay forthwith to the respondent corporation a penalty of 1,000 dollars per day from March 27, 1918, to April 19, 1918, being 24,000 dollars in all, for non-compliance with an order of that Board, dated February 17, 1917, which required the appellant company to furnish and place in operation upon their railway 100 additional cars not later than January 1, 1918, and 100 more not later than January 1, 1919.

The terms of the order of April 19, 1918, the circumstances in which it was made, and the terms of s. 4 of 8 Geo. 5, c. 5, appear from the judgment of their Lordships.

The proceedings in the Appellate Division are reported at 44 Ont. L. R. 381.

1919. Dec. 5, 8, 9. *Clauson K.C.* and *D. L. McCarthy K.C.* for the appellants. On April 19, 1918, when the order imposing the penalty was made, it was impossible for the appellants to comply with the order to furnish 100 additional cars by January 1, 1918. The order therefore was not for the purpose of enforcing compliance, but was the imposition of a penalty as a punishment for non-compliance. The order consequently was not authorized by 8 Geo. 5, c. 30 (Ont.), s. 4. The section should not be given a retrospective effect. If the section does authorize the order made, it was ultra vires of the Ontario Legislature, since it related to criminal law and procedure which are reserved to the Dominion Parliament by head 27 of s. 91 of the British North America Act, 1867. The power of a Provincial Legislature under head 15 of s. 92 to impose a penalty is expressly confined to doing so "for enforcing" any law of the Province. Lastly, both orders were void in that the Ontario Railway and Municipal Board was

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

J. C. 1920
 TORONTO
 RAILWAY
 COMPANY
 v.
 TORONTO
 CITY.

invalidly constituted. The effect of ss. 5, 21, 44 and 53 of the Ontario Railway and Municipal Board Act (R.S. Ont., 1914, c. 186) is to make that Board a "superior Court." Consequently, under s. 96 of the British North America Act, 1867, the members of the Board could be appointed only by the Governor-General, whereas s. 5 of the Ontario Act provides that they shall be appointed by the Lieutenant-Governor of the Province.

[Their Lordships desired that the respondents' argument upon the last contention should be reserved.]

Geary K.C. and *Fairty* for the respondents ; *G. Lawrence* and *Ronald Smith* for the intervener. The order of February 27, 1917, imposed upon the appellants a double obligation, namely, to furnish 100 additional cars, and to do so by January 1, 1918 ; the first obligation was a continuing one. Sect. 260a itself was a notice to the appellants that they would from its date be liable for a default. No retrospective effect was given to the section, since the penalty was imposed only from the passing of the Act. That section was intra vires the Ontario Legislature under heads 14 and 15 of s. 92 of the British North America Act, 1867. Both the Act and the order should be construed ut res magis valeat quam pereat. The preamble to the orders, and the circumstances in which it was made, should be considered in order to ascertain its purpose ; they show that the purpose was to enforce the order of February 17, 1917. [Reference was made to *Wilson v. McIntosh* (1), *Toronto Corporation v. Toronto Ry. Co.* (2), and *Craies on Statute Law*, 2nd ed., p. 348.]

Clauson K.C. in reply referred to *Adkins v. Bliss*. (3)

1920. Jan. 20. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal from the judgment of the Appellate Division of the Supreme Court of Ontario dated December 20, 1918, confirming an order of the Ontario Railway and Municipal Board dated April 19, 1918, which

(1) [1894] A. C. 129.

(2) [1907] A. C. 315.

(3) (1858) 2 De G. & J. 286.

ordered the appellants to pay to the respondents the sum of 24,000 dollars.

The appellants, the Toronto Railway Co., are the holders of an exclusive franchise to operate street railways in the city of Toronto for a period of thirty years from September 1, 1891. The franchise is held under an agreement made between the respondents, the Corporation of the City of Toronto, and the predecessors in title of the appellants, dated September 1, 1891, and confirmed by an Act of the Legislature of the Province of Ontario passed on April 14, 1892 (55 Vict. c. 99).

In the year 1911, the appellants' cars having become overcrowded, the respondents applied to the Railway and Municipal Board of Ontario for an order compelling the appellants to provide more cars; and on November 6, 1914, that Board made an order that the appellants should have in operation an additional fifty double truck motor cars not later than June 1, 1915. These cars have been provided, although not within the period prescribed. Early in the year 1917 the Corporation renewed the application for more cars, and on February 27, 1917, the Board made an order "that the respondent (the Company) do place in operation on its system 100 additional double truck motor cars not later than the first day of January, 1918, and a further 100 double truck motor cars not later than the first day of January, 1919." Some doubt appears to have arisen as to whether this order was within the powers conferred upon the Board by the Railway Act and the Railway and Municipal Board Act; for on April 12, 1917, the Legislature of Ontario, on the petition of the Corporation, passed an Act (7 Geo. 5, c. 92) whereby the order of February 27, 1917, was ratified and confirmed.

The order so made and confirmed was not carried out by the Company, and on January 1, 1918, no part of the additional 100 cars ordered to be provided by that date had in fact been provided or placed in operation; and accordingly, on January 30, 1918, the Company and the Corporation were summoned to appear before the Railway and Municipal Board. The notice or summons issued for this purpose is not forth-

J. C.

1920

TORONTO
RAILWAY
COMPANYv.
TORONTO
CITY.

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

coming, and its terms must be inferred from the statement made by the Chairman of the Board at the commencement of the hearing, as follows :—" This is a hearing initiated by the Board on its own motion with the view of bringing together the City of Toronto and the Toronto Railway Company to determine what progress has been made in the execution of the order of the Board made on February 27, 1917, directing the Railway Company to furnish 200 additional cars, 100 deliverable on January 1 this year and 100 on January 1, 1919."

The Company and the Corporation accordingly attended by counsel before the Board on January 30, 1918, when some arguments were heard and evidence taken. The " hearing " so instituted was continued on February 13 and 20 and March 15 and 18, and on the last-mentioned date was further adjourned.

During the adjournment last referred to the Legislature of Ontario, on the petition of the Corporation, passed an Act (8 Geo. 5, c. 30) whereby it was provided that the Ontario Railway Act should be amended by adding the following as s. 260 a :—" 260 a.—(1) The Board, for the purpose of enforcing compliance with any order heretofore or hereafter made by it, requiring any railway company, operating a railway or street railway in whole or in part upon or along a highway under an agreement with a municipal corporation, to furnish additional cars or equipment for its service, in addition to any other powers possessed by it, may order such company to pay to the corporation of the municipality in which the company so operates a penalty not exceeding 1,000 dollars a day for non-compliance with any such order.

" (2) An appeal from any such order or from the refusal by the Board to make an order, shall lie to the Appellate Division of the Supreme Court of Ontario at the instance of either the said corporation or the said company as fully in all respects as from the judgment of a judge at the trial of an action in the Supreme Court ; and the judgment of the said Appellate Division shall be final and binding, and no further appeal shall be allowed."

The Royal Assent was given to this statute on March 26, 1918.

The "hearing" or inquiry above referred to was resumed before the Board on April 19, 1918, on which date, after a short conversation on some recent efforts on the part of the Company to procure the cars required, and notwithstanding a request by counsel for the Company that he might be allowed to submit evidence on the point, the Chairman of the Board proceeded to give judgment. He said that the Board had come to the conclusion that it was the duty of the Company to have placed orders for the 100 cars, and that if contracts had been promptly placed the cars might have been obtained; that the Board did not propose that their orders should be treated lightly; and that the Board proposed to use the powers conferred upon them by the recent Act in the hope that the Company having experienced the disposition of the Board to insist on performance, would act with greater diligence and promptitude and with a real intention to carry out the orders of the Board in future. An order was accordingly made, on the date mentioned above, in the following terms:—"The Board having called upon the above-named respondent to show cause why the order herein of the Board dated February 27, 1917, requiring the respondent, a street railway company operating a railway or street railway upon or along certain highways under an agreement with the applicant, a municipal corporation, to furnish additional cars for its service, had not been complied with, and upon hearing the evidence adduced and upon hearing counsel for the applicant and the respondent. And it appearing that the said respondent had not complied with the said order of February 27, 1917, and that in the opinion of the Board there had not been proper excuse or justification for such non-compliance by the respondent. And it appearing that, for the purpose of enforcing compliance with the said order, the Board should order the respondent to pay to the applicant a penalty for non-compliance with the said order. 1. This Board doth order that the respondent do forthwith pay to the applicant a penalty of 1,000 dollars per day from March 27, 1918, to the

J. C.

1920

TORONTO
RAILWAY
COMPANYv.
TORONTO
CITY.

J. C. date hereof, both days inclusive, being the sum of 24,000
1920 dollars in all."

TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

An appeal from the above order to the Appellate Division of the Supreme Court of Ontario was dismissed, and thereupon the Company applied for and obtained special leave to appeal from the decision of the Supreme Court to this Board.

On the argument of the appeal before this Board four points were taken on behalf of the appellants.

First it was contended that the Act of 1918 (8 Geo. 5, c. 30), if it is to be construed as authorizing the imposition of a penalty for a past offence, deals with a criminal matter and was therefore beyond the powers of the Provincial Legislature, exclusive legislative authority in relation to the criminal law (including the procedure in criminal matters) having been reserved by s. 91, head 27, of the British North America Act, 1867, to the Parliament of Canada. In their Lordships' opinion this contention should not prevail. It is true that in a series of cases commencing with *Hearne v. Garton* (1) and ending with *Ex parte Schofield* (2), it has been held that the imposition of a fine or penalty (not being by way of reimbursement) for the breach of an order of a public authority is matter of criminal and not civil procedure. But in construing the British North America Act it is necessary to read ss. 91 and 92 together; and regard must be had to the fact that head 15 of the latter section gives to a Provincial Legislature exclusive power to make laws in relation to the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province made within the scope of its powers. It appears to their Lordships that the Act now in question falls within the latter provision and was therefore within the powers of the Legislature of Ontario.

Secondly, it was contended that, as under the order of February 27, 1917, the first 100 additional cars were to be placed in operation not later than January 1, 1918, there was a complete breach of the order on that date, and accordingly there could not after that date be such a non-compliance with the order as to subject the company to the penalties authorized

(1) (1859) 2 E. & E. 66.

(2) [1891] 2 Q. B. 428.

by the Act. Their Lordships are unable to agree with this contention. The substance of the thing to be done was, as pointed out by Meredith C.J. in giving the reasons for the decision of the Supreme Court, that the additional cars should be put in service. The limit of time was a further and subsidiary provision, and notwithstanding the breach of this latter provision, the direction to provide the cars remained in force.

But, thirdly, it was argued on behalf of the appellants that the order of April 19, 1918, was not authorised by the Act of 1918, as it was an order not for enforcing compliance with the order of February 27, 1917, but for punishing a past breach of the order; or, in other words, that the only order contemplated by the Act of 1918 was an order fixing a period within which some existing or future order should be complied with and imposing a penalty for every day of default after that period had elapsed. In their Lordships' opinion this is the true construction of the Act of 1918. The Board are authorised by s. 260a to impose penalties for non-compliance with their orders, but subject to the condition that such penalties must be imposed "for the purpose of enforcing compliance" with those orders; and this expression points, not to the summary imposition of a penalty for a past breach without previous warning, but to the imposition of a penalty in advance and for the purpose of procuring by means of such an inducement obedience to the order. The word "enforce" is ambiguous, and may according to its context refer either to the imposition of a fine or damages or to some process for procuring specific performance; but the expression "enforcing compliance" is more readily susceptible of the latter meaning (cf. *In re Royle* (1), where the expression was "enforce obedience"). Further, it is plain that the Act of 1918, although general in its terms, was passed with special reference to the liabilities of the Toronto Railway Company under the order of February 27, 1917; and it cannot be supposed that the Legislature of Ontario, knowing that a breach of that order had occurred

J. C.

1920

TORONTO
RAILWAY
COMPANYv.
TORONTO
CITY.

(1) (1881) 50 L. J. (Q. B.) 656.

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

and could not be remedied without some further allowance of time, intended to authorize the imposition of a daily penalty commencing from the day following that on which the Act became law. The Act, if construed so as to have that effect would bear too great a resemblance to ex post facto legislation, In their Lordships' opinion it was not the intention of the Legislature that the Board should be authorized to impose penalties except after giving to the Railway Company a warning that after a specified period penalties would be imposed and an opportunity of avoiding them by compliance, within that period, with the requirements of the Board, and accordingly the order of April 19, 1918, was not authorized by the Act.

Apart from the above considerations, the procedure adopted by the Railway Board in making the order under appeal is open to question. The Railway Company appeared before the Board on April 19, 1918, for the purpose of pursuing the inquiry instituted by the Board on January 30, and for no other purpose. No claim had been made by the Corporation for penalties under the recent Act, no notice or summons had been given or issued by the Board which indicated that the question of penalties would come under consideration, nor was this question even referred to at any time before judgment was delivered. Their Lordships accept the view of the Railway Board that the Company were not prevented by war conditions from supplying the cars and were therefore gravely in default; but even so they were entitled, before being subjected to a heavy penalty, to have notice of the claim and an opportunity of meeting it. Whatever view, therefore, might be taken as to the construction of the Act, it seems doubtful whether the present order could stand.

The fourth point raised on behalf of the appellants was that, having regard to the powers conferred by statute on the Railway and Municipal Board, that body must be regarded as a "superior Court" within the meaning of s. 96 of the British North America Act, and accordingly that the members of the Board should have been appointed by the Governor-General and not (as provided by s. 5 of the Railway and Municipal Board Act of Ontario) by the Lieutenant-Governor

in Council. This question was fully considered by the Supreme Court and was decided by that Court against the appellants. But in consequence of the view taken by their Lordships on other points in the case it became unnecessary for them to consider it; and accordingly the point was not argued before the Board, and their Lordships express no opinion upon it.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the order of the Railway Board dated April 19, 1918, and the order of the Supreme Court affirming that order should be set aside. The respondents will pay the costs of the appeal to the Supreme Court and of this appeal.

Solicitors for appellants: *Charles Russell & Co.*

Solicitors for respondents and intervener: *Freshfields & Leese.*

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

[PRIVY COUNCIL.]

TORONTO RAILWAY COMPANY . . . APPELLANTS ;

AND

CORPORATION OF THE CITY OF }
TORONTO } RESPONDENTS.

J. C.*
1920
Jan. 20.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.

Canada (Ontario)—Street Railway—Removal of Snow—Breach of Statutory Duty—Powers of Railway Board—Non-exclusion of Common Law Action—Ontario Railway Act (R. S. Ont., 1914, c. 185), s. 260.

The powers conferred upon the Ontario Railway and Municipal Board to enforce agreements with a municipal corporation for operating street railways along highways do not exclude the right to sue at common law to recover damages for breach of the agreement, or in tort for breach of a statutory duty in relation to the performance of the agreement:—

Held, therefore, that the appellants having, in breach of s. 25 of

* *Present*: VISCOUNT FINLAY, VISCOUNT CAVE, and LORD SHAW OF DUNFERMLINE.

J. C.

1920

TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

55 Vict. c. 99 (Ont.), failed to deposit elsewhere than in the city snow removed from their railway tracks, without obtaining the consent of the respondents' engineer, were liable in an action for damages.

Judgment of the Appellate Division affirmed.

APPEAL from a judgment of the Supreme Court of Ontario, Appellate Division (December 18, 1918), affirming a judgment of Lennox J.

Under the circumstances stated in the judgment of their Lordships, the respondents brought an action in the Supreme Court of Ontario to recover as damages the cost incurred by them in the removal of snow swept from the tracks of the appellants' street railway in Toronto.

The proceedings in the Appellate Division are reported at 46 Ont. L. R. 308.

1919. Dec. 2, 4, 5. *D. L. McCarthy K.C.* for appellants. There was no jurisdiction to entertain the action. The matters in contest were within the exclusive jurisdiction of the Ontario Railway and Municipal Board under s. 260 of the Railway Act (R. S. Ont., 1914, c. 185), and ss. 21, 22 of the Ontario Railway and Municipal Board Act (R. S. Ont., 1914, c. 186). The last-mentioned section expressly provides that the jurisdiction of the Board is to be exclusive. Under s. 5, sub-s. 4, of c. 186, the Board has all the powers of a Court of record, and it had, under s. 260, sub-s. 2, of c. 185, ample power to enforce any order which it made. But in any case the action should be dismissed, because upon the true construction of the agreement and s. 25 of the Act of 1892, there was no failure by the appellants to perform their obligation to remove the snow. They were not bound to remove outside the city snow deposited by them at the side of the tracks, until the city engineer appointed a place for its final deposit.

Geary K.C. and *Fairty* for the respondents. The right to sue for damages either for a breach of the agreement or for a breach of statutory duty, was not taken away by the Acts relied on. The Railway and Municipal Board had no jurisdiction to award damages. The jurisdiction of the Board is administrative, and complementary to that of the Courts, not exclusive of it. If s. 22 of c. 186 entirely ousts

the jurisdiction of the Courts it is ultra vires having regard to s. 96 of the British North America Act, 1867. Upon the true construction of the agreement and s. 25 of the Act of 1892 there was a failure by the appellants to perform their obligations. The respondents were entitled to do the work and sue for damages. It does not appear that the appellants ever tried to get permission to deposit the snow on private property; the evidence shows that they might have done so.

D. L. McCarthy K.C. replied.

1920. Jan. 20. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. The question in this case has reference to the removal of snow which falls on the lines of a street railway which runs through the city of Toronto. The judgments of the Court below have affirmed the liability of the appellants, the railway company, for the cost of the removal by the respondents, the city, of snow swept by the appellants from the tracks of their railway on to the solum of the streets on the side of the tracks.

The respondents sued the appellants for the cost of the removal of that snow, and on April 13, 1918, Lennox J., who tried the case, gave a judgment in the respondents' favour for 16,118.44 dollars. That judgment was affirmed by the Appellate Division of the Supreme Court of Ontario on December 18, 1918.

In 1891 the respondents entered into an agreement, dated September 1 of that year, with George Washington Kiely and others, called the "purchasers," for the sale to the respondents of the street railways or tramways then existing in the city of Toronto, together with the exclusive right to operate surface street railways in the city for the period and on the terms set forth in the document. By an Act of the Ontario Legislature, passed in 1892 (55 Vict. c. 99), the appellants were incorporated in order to take over and work this contract, and the agreement was declared valid and binding, with certain provisos which the Act contained.

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

J. C.

1920

TORONTO
RAILWAY
COMPANY

v.

TORONTO
CITY.

These need not be entered upon further than to refer to s. 25 of the statute, the terms of which will be hereinafter quoted. Following upon the statute, the appellants operated the street railways in Toronto, and have continued to do so under the agreement and Act.

Thereafter, and particularly since 1900, there has been a copious stream of Ontario legislation bearing upon the Ontario railways and upon the powers and functions of the Ontario Railway and Municipal Board. These statutes stand chronologically as follows :—

1900, 63 Vict. c. 102. This Act (passed, it has been said, in consequence of certain judicial pronouncements) amended the Act of 1892 by adding a section thereto dealing with the enforcement of agreements and giving power to the Court to inquire into any alleged breach thereof and make such order as might be necessary “in the interests of justice to enforce a substantial compliance with the said Act” and to “enforce the same by order and injunction.” It further, by s. 5, gave power to the Court, “notwithstanding any rule of law or practice to the contrary,” to make an order for specific performance in the event of a particular breach or breaches.

In 1904 the Act 4 Edw. 7, c. 93, was passed, still further amending the Act of 1892 and providing for the liability of the appellants, in the event of their neglecting or refusing to give a reasonable service of cars, to pay sums of 100 dollars per day, recoverable by action by the Corporation “in any Court of competent jurisdiction.”

In 1906 came the Ontario Railway Act (6 Edw. 7, c. 30) a general Act, which, however, by s. 5, preserved the effectiveness of any special Acts by making them prevail in the event of any conflict with the provisions of the general statute. In the same year (1906) was passed the Ontario Railway and Municipal Board Act.

These two respective statutes—the one dealing with the railway and its powers, and the other with the Board and its powers—are repeated as follows : In 1913 there were the two Acts, 3 & 4 Geo. 5, c. 36 (the Railway Act) and c. 37

(the Board Act). Then in 1914 came the Revised Statutes (c. 185 being the Railway Act and c. 186 being the Board Act).

This wealth of legislation is to some extent accounted for by revision merely, but it also contains a certain frequency of change, and it is manifest that appeals to the Legislature to readjust the relations of the city and the railway company were well known and were accompanied by success. In the result the task of judicial interpretation becomes, on the part of the judges in the Courts below, increasingly complex. Their Lordships have, as the Courts below had, to thread their way through these Acts, and they have come to a conclusion which agrees in substance with the judgments appealed from.

There are, in fact, only two points in the appeal. The first is a point of jurisdiction, it being maintained that, in view of the comprehensive powers of the Railway Board, Courts of law have no jurisdiction to give a decree for payment to the Corporation in respect of a tort arising out of a breach of the obligations resting upon the railway company under the Act of 1892, which confirmed the agreement of 1891. The other point has reference to what is the sound construction of that statute and agreement.

This judgment will take these points in their order.

I. On the point of jurisdiction, the appellants rely upon s. 260 of the Railway and Municipal Board Act of 1914 which, as already mentioned, is a repetition of the Acts of 1913 and 1906. The material portions of s. 260 are as follows :

“(1.) Where a railway or street railway is operated in whole or in part upon or along a highway under an agreement with a municipal corporation, and it is alleged that such agreement has been violated, the Board shall hear all matters relating to such alleged violation and shall make such order as to it may seem just, and by such order may direct the company or person operating the railway, or the municipal corporation, to do such things as the Board deems necessary for the proper fulfilment of such agreement, or to refrain from doing such acts as in its opinion constitute a violation thereof. (2.) The Board may take such means and employ such persons as may

J. C.

1920

TORONTO
RAILWAY
COMPANYv.
TORONTO
CITY.

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

be necessary for the proper enforcement of such order, and in pursuance thereof may forcibly or otherwise enter upon, seize and take possession of the whole or part of the railway, and the real and personal property of the company, together with its books and offices, and may, for that purpose, assume and take over all or any of the powers, duties, rights and functions of the directors and officers of such company and supervise and direct the management of such company and its railway in all respects, including the employment and dismissal of officers and servants of the company, for such time as the Board shall continue to direct such management. (3.) Upon the Board so taking possession of such railway and property, it shall be the duty of every officer and employee of the company to obey the orders of the Board or of such person as it may place in authority in the management of any or all departments of such railway. (4.) The Board shall, upon taking possession, have power to demand and receive all money due to, and to pay out all money owing by, the company, and may give cheques, acquittances, and receipts for money to the same extent and in as full and ample a manner as the proper officers of the company could do if no such order had been made."

There can be no doubt that the Board, in the event of violation of the agreement, is thus vested with very strong powers. It may make "such order as to it may seem just" and direct the company to do what "the Board deems necessary for the proper fulfilment of such agreement." And in the event of the railway company remaining obdurate, the Board may itself enter into possession of the property and business and carry on the latter.

The situation in which the parties found themselves—more particularly in the years 1914 and 1915—is shown in the correspondence which has been produced—a correspondence which discloses the acute differences which prevailed between the parties on this subject of the removal of snow from the street railway tracks. The railway company declined to budge from a certain position which it took up, that it had a right to put the snow on the same places of

deposit as were used by the city. All appeals by the latter were met by dilatory tactics, culminating in a refusal to do anything else than they were doing, that is to say, putting the track snow on the streets, and leaving it there. In these circumstances the judge of the county court was called in as arbitrator, and he affirmed the duty of the railway company under the agreement. This was disregarded. Then proceedings took place before the Railway and Municipal Board. They had the same result; and that Board found its orders met with the same policy of obstruction and non-compliance.

The point as to jurisdiction arises here, and may be put thus: Was the city in these circumstances excluded from all common law remedy for the expense consequent upon the performance of an act of administration which they had themselves to take up in the interest of public convenience and for the avoidance of public danger—an act which, if the view of the Courts below be correct, was one which fell to be performed by the street railway company?

It may seem natural to observe that the strong powers vested in the Railway and Municipal Board should be held to include, not only the doing of such things, but the making of such orders for payment of money as would clear up the situation which had been created; but their Lordships, after full consideration of the statutes, do not see in them any clause which either expressly or by implication gives that Board a power to grant a decree for a sum of money due as upon tort or in respect of breach of contract, as already referred to. It would require, in their Lordships' opinion, the clearest expression or the clearest implication, in order to confer such a jurisdiction upon a statutory Board, and it would further require the clearest expression or implication in order to oust the jurisdiction of the ordinary Courts of the country to whom awards of damages for failure of duty, breach of contract, or commission of tort are matters of plain and every-day jurisdiction. They accordingly find, agreeing with the Courts below, that the Court had jurisdiction to deal with the action and to give a decree in respect to the claim sued for.

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

II. As to the merits of the dispute between the parties, it is, in their Lordships' view, unnecessary, and therefore undesirable, to make further reference to the statutes and agreement than by quoting s. 25 of the Act of 1892 and clauses 21 and 22 of the agreement of 1891. The clauses of the agreement are as follows: "21. The track allowances (as hereinafter specified), whether for a single or double line, shall be kept free from snow and ice at the expense of the purchaser, so that the cars may be used continuously; but the purchaser shall not sprinkle salt or other material on said track allowances for the purpose of melting snow or ice thereon, without the written permission of the city engineer, and such permission shall, in no case, be given on lines where horse power is used. 22. If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the city engineer so directs, evenly spread the snow on the adjoining portions of the roadway; but, should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks, sixteen feet six inches, and for single tracks, eight feet three inches) shall, if the city engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the city engineer."

The section of the statute is as follows: "25. And whereas doubts have arisen as to the construction and effect of sections 21 and 22 of the said conditions it is hereby declared and enacted that the said company shall not deposit snow, ice, or other material upon any street, square, highway, or other public place in the city of Toronto, without having first obtained the permission of the city engineer of the said city, or the person acting as such."

One cannot peruse the documents and communications anterior to this action without seeing how the sections of the agreement in particular have afforded ground for maintaining different constructions thereof. Clause 21 of the agreement

is quite definite that the track allowances are to be kept free from snow and ice at the expense of the purchaser. That has not been challenged. It is a general regulative section; and, under it, it must be acknowledged that the duty of clearance of snow from the lines rests with the railway company. The true question, and indeed the only one arises after that duty has been performed, and is: "What is to be done with the snow thus cleared away by the railway company on to the city streets?" Notwithstanding s. 25 of the statute, as above quoted, the dispute as conducted between the parties had reference mainly to the latter portion of clause 22 of the agreement, which provides that should "the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances . . . shall, if the city engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the city engineer."

There are no doubt certain troublesome questions of construction here. What is "the quantity of snow or ice"? Does that mean the accumulated quantity, or does it mean the quantity of the fall? Further, does that part of clause 22 apply to a quantity of ice only so long as it is upon the track itself? If so, looking to the fact that some years ago rotary machines were provided which were sanctioned by the Board for the continuous clearing of the tracks, it is in the highest degree unlikely that the quantity of snow on these themselves would ever reach a height of six inches. Then, lastly, does the provision that the material is to be removed and deposited at such point or points on or off the street as may be ordered by the city engineer obliterate the duty altogether in the event of a specific point not being chosen by the engineer either in or out of the city? Their Lordships do not enter upon these questions (others might easily be figured), but they merely state them in order to indicate the value of the statutory interposition for the avoidance of trouble in the construction of these clauses of the agreement.

In the opinion of their Lordships, s. 25 of the Act of 1892,

J. C.

1920

TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

J. C.
1918
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

which proceeds upon the preamble that doubts have arisen as to the construction and effect of the articles above quoted from the agreement, imposes a duty upon the railway company which is clear and absolute. It is that they "shall not deposit snow, ice, or other material upon any street, square, highway, or other place in the city . . . without having first obtained the permission of the city engineer." There does not seem to their Lordships to be any advantage in discussion or elaboration in regard to this section, its words being so plain.

The only point that remains is a point to be answered affirmatively or negatively. Did the railway company deposit that snow on the streets, etc., without the engineer's consent? There is no doubt that the company did so. There is accordingly no doubt that the company is in breach of its statutory duty. By the word "deposit" is meant the final disposal of the snow which is swept from the tracks. There must, *ex necessitate*, be an interim and quite temporary deposit of the snow as it is swept off the tracks on to the streets. That snow so swept off must, according to the statute, be deposited elsewhere than in the city unless the city engineer gives his consent.

That he would have given his consent to any reasonable arrangement their Lordships do not suggest any doubt; but in point of fact consent was not obtained from him, and that is an end of the matter so far as the section is concerned. Over and over again what he did was to order the accumulations to be taken to some point off the streets. This was his way of indicating that he did not consent to its remaining on the streets or public places; but before the railway company can claim any right under the section to leave a deposit of snow in the city they must first establish that, *de facto*, they have the engineer's consent to what they propose to do.

Their Lordships are relieved to think that this in substance may impose no great hardship. In answer to a question put to him on this subject to the following effect: "You realise that, in the absence of mentioning a place to dump the snow,

the company, unless they had some place of their own, would have to take it outside of the city altogether ? ” Mr. Harris, the city engineer, replied : “ Oh no ; they could do as we do. We get permission from private individuals to use a place for dumping, and from the Harbour Commissioners Board to dump in the bay, and we got permission from the Park Commission to dump in some of the breathing spaces.” Their Lordships do not take that as exhaustive of the opportunities for disposal which were and are open to the railway company, if it be willing and anxious to perform its statutory duty, but it indicates that it is confronted by no insuperable difficulty in this task.

Notwithstanding a statutory duty so clear as their Lordships have indicated, the company continued to sweep the snow from the tracks and leave it on the streets. In those circumstances, what were the city authorities to do ? An emergency was created which might have been dangerous to traffic and to life. Their Lordships think that the city was quite within its rights in seeing to the streets being cleared, and that the expense so incurred, in so far as applicable to removing the improper deposit by the railway company, is one to recoup which the company is under obligation. So far as the payment is concerned, it would make no difference whether it could be ascribed to damages for breach of contract or to damages in tort ; but in the opinion of their Lordships the payment falls to be made as damages for tort committed in the breach of a statutory prohibition.

Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors for appellants : *Charles Russell & Co.*

Solicitors for respondents : *Freshfields & Leese.*

J. C.
1920
TORONTO
RAILWAY
COMPANY
v.
TORONTO
CITY.

H. L. (E).*

[HOUSE OF LORDS.]

1920
Feb. 17.

H. AND C. GRAYSON, LIMITED . . . APPELLANTS ;

AND

ELLERMAN LINE, LIMITED . . . RESPONDENTS.

*Negligence—Contributory Negligence—Ship Repairers—Inflammable Cargo—
Damage to Ship by Fire.*

A firm of ship repairers were riveting cleats to the weather deck of a steamer which, under the authority of the Admiralty, they were fitting with apparatus for protection against mines. The rivets were heated in a furnace on the weather deck, and lowered in a bucket through an open hatchway to the 'tween decks, where a riveter drove them into holes bored in the under side of the weather deck to receive them. The steamer was discharging from a hold below the 'tween decks, and a 'tween deck hatchway was open directly below the open hatchway on the weather deck, so that a cargo of jute in the lower hold lay exposed. A boy carrying a red-hot rivet in a pair of tongs to the bucket close by the weather deck hatchway slipped on the deck, and the rivet shot over the coamings and through both the open hatchways on to the cargo of jute and set it on fire.

In an action by the owners of the steamer against the ship repairers for damage to the ship and cargo:—

Held, that the damage was caused by the negligence of the ship repairers in doing the work as they did while the jute was exposed, and that the shipowners were not guilty of any negligence.

Decision of the Court of Appeal [1919] 2 K. B. 514 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Roche J.

The facts are fully stated in the report of the case before the Court of Appeal, and sufficiently appear from the judgment of the Lord Chancellor.

The action was brought by the respondents, the owners of the steamship *City of Edinburgh*, against the appellants, a firm of ship repairers, in respect of the damage caused to the ship owing to the negligence of the appellants. The respondents by their statement of claim alleged that on June 27,

* *Present* : LORD BIRKENHEAD L.C., VISCOUNT FINLAY, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

(1) [1919] 2 K. B. 514.

1918, while the *City of Edinburgh* was lying in the Hornby Dock, Liverpool, discharging cargo from holds Nos. 1, 2 and 3, the appellants were engaged upon the steamship in fitting an Otter mine defence gear, and that owing to the negligent manner in which they conducted their work they allowed a red-hot rivet to fall into No. 3 hold amongst bales of jute stored therein, and thereby caused a fire to break out which occasioned extensive damage to the steamship and her cargo. By their particulars of negligence the respondents alleged that the appellants were negligent in that they : (a) worked at the riveting while cargo was being discharged from No. 3 hold ; (b) disregarded the verbal warning given by the first officer to the appellants' servants that their work was not to be proceeded with until No. 3 hold was discharged ; (c) allowed red-hot rivets to be passed from the main deck to the 'tween decks through the open hatchway of No. 3 hold ; (d) allowed red-hot rivets to be carried along the deck near an open hatchway in pliers ; and (e) failed to take any adequate precautions to prevent red-hot rivets falling on to inflammable cargo or into the said hold.

The appellants by their defence denied the alleged negligence, and in the alternative said that the damage complained of was the result of inevitable accident. In the further alternative they alleged that the damage was caused or contributed to by the respondents' own negligence in failing to cover the 'tween decks hatchway or the cargo of jute in the lower hold.

Roche J. found that the sole cause of the damage was the omission to isolate the lower hold from the 'tween deck by placing the hatches over the 'tween deck hatchway, and that this was the omission of the respondents and amounted to negligence on their part ; and further that if the appellants were guilty of any negligence in omitting to take proper precautions to secure the safety of the ship the respondents were equally guilty, and that the respondents could not recover damages in respect of a joint omission. He therefore gave judgment for the appellants. The Court of Appeal by a majority (Bankes L.J. dissenting) reversed this decision. Bankes L.J. held that the effective cause of the accident was

H. L. (E.)

1920

H. & C.
GRAYSON
v.
ELLERMAN
LINE.

H. L. (E.) the combined negligence of both parties and that the appeal failed. Duke L.J. held that, assuming that both parties were negligent, the immediate cause of the loss was the negligence of the defendants (the present appellants). Atkin L.J. held that the defendants were alone guilty of negligence.

1920
H. & C.
GRAYSON
v.
ELLERMAN
LINE.

1920. Feb. 16, 17. *Rigby Swift K.C.* and *Douglas Hogg K.C.* (with them *Greaves Lord K.C.* and *Stone Hurst*) for the appellants.

The respondents in omitting to put on the hatches to the 'tween deck hatchway were guilty of negligence, and that negligence was an effective cause of the accident. An earlier decision of this House in *H. & C. Grayson v. South Wales and Liverpool Steamship Co.* (1) governs this case. That was a case of damage by water where one cause of the damage was the leaving open of a stop-cock by the ship's engineering officer. Lord Halsbury there said that as the accident happened owing to the combined negligence of both parties the legal result was that the plaintiffs could not recover against the defendants.

[LORD SUMNER. That case is distinguishable because there the appellants had contracted to do the work for the respondents; here they were on the ship by leave of the respondents.]

The same principle applies here. It is stated in the widest terms by Lindley L.J. in *The Bernina*. (2) "If there has been as much want of reasonable care on A.'s part as on B.'s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law." If the plaintiff has to say that two factors brought about the accident and that he is responsible for one he cannot recover. Here the respondents, knowing the circumstances, did not take the precautions which a reasonable man would have taken

(1) Unreported. H. L., March 13, 1903.

(2) (1887) 12 P. D. 58, 89.

to ensure the safety of the ship, and, if the appellants were negligent, the respondents were equally negligent. There is here no question of the appellants' negligence being, as Duke L.J. held, subsequent to the respondents, the two negligences were going on side by side; and there is no room for the application of the principle laid down in *British Columbia Electric Ry. Co. v. Loach*. (1) It is not suggested that the measure of the negligence is the same in each case. The measure of the appellants' negligence is their duty under the contract. The measure of the respondents' negligence is the necessity to take reasonable precautions having regard to their knowledge of the circumstances. It was the business of those in charge of the ship to put on the hatches, which were under their control and not under the control of the appellants. The chief officer, in not taking the obvious precaution which would have prevented the rivet from falling where it did, created one of the factors which brought about the accident, and the respondents have therefore no cause of action.

Sir John Simon K.C., Langdon K.C. and A. T. Miller K.C. for the respondents were not called upon.

LORD BIRKENHEAD L.C. My Lords, this is an appeal by the appellants against an order of the Court of Appeal which was delivered on May 9, 1919, reversing a judgment of Roche J. given on February 3 of the same year. The action was brought by the respondents to recover damages from the appellants in respect of alleged negligence on their part whereby the respondents' steamship, the *City of Edinburgh*, was set on fire and sustained damage to itself and its cargo.

The case for the respondents, the plaintiffs in the action, was that on June 27, 1918, while the steamship the *City of Edinburgh* was lying in dock in Liverpool discharging a cargo from holds 1, 2 and 3, the appellants, who are ship repairers, were at the same time engaged in fitting an Otter mine defence gear in the steamship under circumstances

H. L. (E.)

1920

H. & C.
GRAYSON
v.
ELLERMAN
LINE.

(1) [1916] 1 A. C. 719.

H. L. (E.) of which I will say a word in a moment, and that they
 1920 discharged this work so negligently that they allowed a
 H. & C. red-hot rivet to fall upon No. 3 hold among certain bales of
 GRAYSON jute which were stowed therein, thereby causing extensive
 v. damage to the vessel and cargo.
 ELLERMAN
 LINE.

My Lords, the facts of the case are not in serious controversy.
 At the relevant period, and under powers conferred by
 the Defence of the Realm Regulations, the Admiralty,
 with the acquiescence of other authorities concerned, had
 issued orders under a Defence of the Realm Regulation that
 what is known as the "Otter mine" or "paravane" defence
 gear should be fitted, at the cost of the Government, on board
 vessels so described as to include the *City of Edinburgh*; and
 the Defence of the Realm Regulation concerned contained
 certain punitive provisions dealing with persons who should
 obstruct the carrying out of the work so ordered. Pursuant
 to the directions which were given, and having no choice
 in the matter, the respondents gave the necessary instruc-
 tions to Vickers, Ltd., who were the only persons authorized
 by the Admiralty to supply the apparatus in question. They
 informed Vickers that the vessel was due to arrive in the
 Mersey on a certain date, and asked that arrangements should
 be made to equip her with the apparatus. On June 10,
 1918, an order was given by Vickers, Ltd., to the appellants
 to carry out the installation on behalf of the Government.
 It has been said in the course of the case that there was no
 absolute compulsion of law upon the shipowners that they
 should establish, or permit the establishment of, this apparatus
 on their vessels. This is technically true, but it is neverthe-
 less necessary to observe that it would have been impossible
 for the respondents to allow their ships to go to sea without
 the apparatus in question. They were not free agents.

In these circumstances the *City of Edinburgh* arrived
 at Liverpool on June 17, 1918; she berthed in the Hornby
 Dock; and on June 18 the respondents began to discharge
 the cargo. Certain conversations took place on June 20
 and on later days between the chief officer and a
 Mr. Sinclair, who represented the appellants, and between

Mr. Banks, the stevedore who discharged the cargo, and other persons representing the appellants as to the safety of the operations contemplated, having regard to the fact that there was a certain quantity of jute, a highly inflammable commodity, in No. 3 lower hold. I will deal, so far as seems necessary, with these conversations hereafter.

On June 24 the appellants commenced to carry out the work. It is not necessary to enter into the method employed in detail. It is sufficient to say that it required that some seventy or eighty rivets should be fixed to the under side of the weather deck above the 'tween deck space of No. 3 hold, in order to retain in position certain cleats and other parts of the gear. The methods adopted by the appellants were of an extremely simple character. On the weather deck of the ship a portable furnace was placed and a rivet was heated in the fire, which was then carried in pliers by a boy from the fire for a distance of about twelve feet along the deck to the hatchway down which it was required to be lowered. The rivet was placed in a bucket containing ashes which had been placed on the deck. This bucket was then hooked on to a rope and lowered by the boy to the lower deck where it was received by another boy who, in his turn, removing it with pliers, handed it to a further workman for the purpose of putting it through the rivet hole on the under side of the weather deck.

My Lords, between June 24 and June 27, when the fire took place, the ship continued to discharge rice from No. 3 lower hold, through a small hatchway near the after end of the hold, and the operations, the general nature of which I have described, were carried on throughout in close proximity to the exposed cargo of jute. Some discussion took place at the trial as to the conversations between the representatives of the shipowners and the representatives of the appellants, of which I have spoken, as to whether or not the work undertaken by the appellants could with safety be carried on. The learned judge has arrived at certain findings upon these points which I do not propose to examine with any particularity because their

H. L. (E.)

1920

H. & C.
GRAYSON

v.

ELLERMAN
LINE.Lord
Birkenhead L.C.

H. L. (E.) importance is secondary in relation to other issues which require decision. But the evidence, so far as it goes, is to the effect that apprehensions were not entertained upon this point by the representatives of the appellants, while some degree of apprehension was entertained and was expressed by those who represented the shipowners. On June 27, after some sixty-seven rivets had been fixed in position, a boy in the employ of the appellants was proceeding with a hot rivet towards the bucket, which was on the well deck near No. 3 hatchway, when he slipped and fell. The hand in which he held the pliers and rivet struck the coamings of the hatchway. The rivet was thereupon projected into the hatchway and fell on to the jute, setting it on fire and causing great damage to the cargo and vessel.

The questions which arise for decision upon the facts as I have shortly stated them are :—

1. Were the appellants guilty of negligence ?
2. Were the respondents guilty of negligence ?
3. If both parties were guilty of negligence could the appellants in the result by the exercise of ordinary care and diligence have avoided the mischief which happened ?

Now, my Lords, the learned judge—I agree upon this point with counsel for the appellants—was on the whole, though somewhat obscurely, of opinion that the appellants had not been guilty of negligence; and he reached (though he did not plainly state) the conclusion that the negligence was entirely the negligence of the respondents.

My Lords, like the majority of the Court of Appeal, I find myself unable to accept this view. I think on the contrary that the appellants were guilty of very grave negligence. It is surely impossible to exclude from consideration these circumstances: They were ships' repairers, they were persons professing competence and experience in this particular matter, and they were sent by those who were officially responsible in order to do this very work on this very vessel. I do not think that this case, rightly considered, presents any very formidable problems of law;

1920
H. & C.
GRAYSON
v.
ELLERMAN
LINE.
Lord
Birkenhead L.C.

still less do I think that it presents any analogy to those cases which have been cited to your Lordships and which raise in a familiar atmosphere the doctrine of contributory negligence. No such case is put forward or can be sustained. The appellants, as I have said, brought their experience to this task. The task which required their consideration was to fit this apparatus in a ship which contained, and which contained to their knowledge, large quantities of exposed jute. The exposure could have been guarded against. The appellants did not attempt to guard against it. In my judgment, having regard to the methods which they adopted, the appellants were guilty of negligence on each several occasion on which, in the neighbourhood of that jute so exposed, they proceeded by the crude method I have described to carry out the work which they had gone on board this ship armed with official authority to discharge.

In this connection it is important to point out that the appellants were plainly *domini negotii*. They could have required the respondents to close the hatchways. Failing obedience they could have taken proceedings against them under the Defence of the Realm Regulation for obstruction. If the emergency did not present itself to their eyes in so peremptory a light they could have postponed the installation until the discharge was completed. They did none of these things.

It is contended by the appellants in the next place that the respondents were equally with themselves guilty of negligence in this matter; and Mr. Swift goes so far as to say that the very same considerations which involve (if they be involved) the appellants in the charge of negligence must necessarily impose an equal stigma of negligence upon the respondents. I am not able, for more reasons than one, to accept this view. In the first place I hold the opinion strongly that different standards were imposed upon the two parties. The appellants owed a direct and definable duty to the respondents. The respondents owed no comparable duty to the appellants. In the second place I attach importance to the considerations already urged that the

H. L. (E.)
1920
H. & C.
GRAYSON
v.
ELLERMAN
LINE.
—
Lord
Birkenhead L.C.

H. L. (E.) respondents were in the position of men who necessarily brought their vessel there, in order to have certain changes made in its equipment which the trained intelligence of Government experts prescribed with compulsory authority as desirable in the public interest. For the purpose of effecting those additions to the equipment of the vessel they took on board the expert workmen who were chosen by authority for that purpose, and they indicated to them certain contingent risks which as shipmasters seemed to them to demand consideration. The experts, taking the view, as it seems to me with incredible rashness, that this work could be carried out in exactly the same manner, and with exactly the same precautions, as if the vessel had been an empty vessel containing no cargo, by their conduct impressed upon the respondents with the authority of experts, and in the clearest manner possible, their own view that the work could be carried on with perfect safety, and with due regard to all their responsibilities, in the manner in which it was in fact carried out. In other words "spondentes peritiam artis" they made light of the representations made to them, and reviewing, as I am entitled to do, the evidence as a whole, I doubt whether Roche J. did complete justice to the cumulative effect of these representations.

That the appellants, who by their conduct had precluded themselves from contending that the work could not in the judgment of the experts be prudently carried on in this way, should be heard to contend that the respondents, who were not experts, who never installed such apparatus, and who ex hypothesi had very little experience of the difficulties, should have closed this hold which the appellants never asked them to close, and to contend consequentially that, failing to do so, they were guilty of negligence, is a proposition which I at least am unable to accept. I differ from the view taken by some of the learned judges in the Court of Appeal in this respect. While I entertain no doubt that the appellants were guilty of negligence I have formed the opinion that the respondents were not so guilty.

The conclusion, which I have clearly reached, that the respondents were not blameworthy, makes it unnecessary to consider any question of contributory negligence. The appellants were negligent; and the negligence which is imputable to them was the cause of the damage. This concludes the matter.

H. L. (E.)

1920

H. & C.
GRAYSON
v.ELLERMAN
LINE.Lord
Birkenhead L.C.

My Lords, I have this to add. I listened with great care to the judgments, as they were read, of the Lords Justices in the Court of Appeal, and I should have been content to state my own conclusion in the language used by Atkin L.J. in his most admirable judgment. I assent particularly to the illustration which he gives in the latter part of his judgment in which he points out that the appellants in this case, under circumstances in which they received remuneration, brought upon the respondents' ship that which was in fact dangerous. They seek then, when certain consequences happened from the negligent handling on their part of that which was dangerous, to involve the respondents in responsibility, equal to their own, for the evil consequences which emerged by saying that they had comparable opportunities to their own of forming a judgment as to the risks which in their view both of them were undertaking.

I have, I hope, made it plain that in my view the respondents had no such opportunities. They indicated an apprehension. It was dismissed. The appellants, by dismissing it, assumed exclusive responsibility. In the discharge of that responsibility they were guilty of negligence and they must take the consequences.

My Lords, I agree entirely with the conclusion which Atkin L.J. reached and I move your Lordships that this appeal be dismissed with costs.

VISCOUNT FINLAY. My Lords, I am of the same opinion. I do not think that the collision cases which have been referred to a good deal are in their details applicable to a case like the present. In collision cases the question which arises very frequently is whether although the defendant has been guilty of negligence the plaintiff by the exercise of reasonable

H. L. (E.) care might have prevented the consequences of that negligence.

1920

H. & C.
GRAYSON

v.

ELLERMAN
LINE.

Viscount Finlay.

That is not the question that really arises here. This is a case of work being done upon a ship of the plaintiffs, which went on for a week or more, and the way it is put is this : “ You, the plaintiff, had property in your charge with regard to which you were in the position of owner for present purposes, and you were guilty of such a want of care of that property as to disable you from recovering from me, the defendant, on account of my alleged negligence.” Messrs. Grayson are in the position of experts ; they came to this ship for the purpose of doing this particular work. As has been pointed out in the judgments below, the doing of that work involved the use of fire, the use of fire and red-hot rivets. Well, that fire and red-hot rivets occasion some risk of fire to an inflammable cargo is of course obvious ; but it was for the experts in work of this kind to satisfy themselves that the work could be carried on with reasonable safety, taking precautions such as the course of the work admitted of. It appears to me that it was for Messrs. Grayson to require that the necessary precautions should be taken. I am not satisfied that putting on the hatches was the only way in which the work might have been rendered safe. If the work was really dangerous, if no precautions could be taken sufficient to make it reasonably safe, then I think Messrs. Grayson, as experts, ought to have said to the shipowners : “ We really cannot, under existing conditions, go on with this work. If we do, it must be at your risk, and you will take the risk of fire.” They did nothing of that kind, they went on with the work, and it appears to me that, if the only way of doing the work safely was to have the hatch closed, Messrs. Grayson ought to have insisted upon the closing of that hatch, and to have said, if the owners would not close it, “ We really cannot go on. If we do go on we inform the shipowners that we go on at their risk.”

My Lords, I quite agree with what the Lord Chancellor has said as to the judgment delivered by Atkin L.J. That judgment seems to me to state the problem correctly and deals with the case to my mind on the true lines.

LORD SUMNER. My Lords, I concur. I think the appeal should be dismissed, as no new question of law arises in this case and upon the facts I think the conclusion arrived at by the majority of the Court of Appeal was right.

H. L. (E.)

1920

H. & C.
GRAYSON
v.ELLERMAN
LINE.

LORD PARMOOR. My Lords, I concur. I think the first question to be ascertained is whether there was any negligence on the part of the defendants, who are the appellants, and if there was such negligence what was its nature and character?

Now the learned trial Judge found that there was in his opinion no negligence upon the part of the defendants in the method of carrying out what must have been this dangerous work in connection with riveting on the cleats which were required in connection with the navigation of the vessel. I cannot agree with that finding, and I think that the test laid down by *Atkin L.J.* (1) must be accepted—namely, that the defendants as regards their methods “were bound to exercise care, not generally, but in relation to the conditions they found. . . . They did find a ship in process of discharge containing an inflammable cargo exposed to view. They should have adopted precautions commensurate with the danger.” I agree with *Atkin L.J.* that the negligence was of a very gross character in the method of carrying out the work.

The next question then which has to be dealt with is whether there was contributory negligence on the part of the plaintiffs, and I only wish to refer to that for this reason. I do not think that the question of contributory negligence depends upon any breach of duty as between the plaintiff and a negligent defendant; it depends entirely on the question whether the plaintiff could reasonably have avoided the consequences of the defendant’s negligence. Here again I agree—it is a question of fact—with the conclusion which *Atkin L.J.* has drawn. I also agree with *Atkin L.J.* upon the third point on which he bases his decision and judgment in this case. He finds that, even if there had been negligence which might have contributed

(1) [1919] 2 K. B. 535.

H. L. (E.) 1920
H. & C. GRAYSON
v.
ELLERMAN
LINE.
Lord Parmoor.
—

to the accident, yet the defendants could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened. The plaintiffs' negligence in such a case would not excuse the defendants. That is the principle laid down in the case of *Radley v. London and North Western Ry. Co.* (1). Therefore, my Lords, I agree entirely with the judgment of Atkin L.J. in the Court of Appeal.

LORD WRENBURY. My Lords, I agree that this appeal fails, and should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Feb. 17, 1920.

Solicitors for the appellants: *Finch, Jennings & Tree, for Weightman, Pedder & Co., Liverpool.*

Solicitors for the respondents: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

(1) (1876) 1 App. Cas. 754.

[HOUSE OF LORDS.]

H. L. (E.)*

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT;

1929

March 5.

AND

BEARD RESPONDENT.

*Criminal Law—Murder—Manslaughter—Act of Violence done in furtherance
of Rape—Plea of Drunkenness—Misdirection.*

The rule laid down in *Rex v. Meade* [1909] 1 K. B. 595 that a person charged with a crime of violence resulting in death or serious injury may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous cannot be supported as a rule of general application, but must be confined to the class of case with which the Court was there dealing.

Evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime ought to be taken into consideration, with the other facts proved, in order to determine whether he had that intent.

The test of criminal responsibility is not the same in the case of drunkenness as in the case of insanity, and, upon a plea of drunkenness where insanity is not pleaded, the jury should not be asked to consider whether, if the accused knew what he was doing, he knew also that he was doing wrong.

Upon an indictment for murder it was proved or admitted that the accused ravished a girl of thirteen years of age and in furtherance of the act of rape placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole defence was a plea of drunkenness.

Baillache J. directed the jury that, if they were satisfied by evidence that the accused was so drunk that he did not know what he was doing or did not know that he was doing wrong, the defence of drunkenness succeeded to the extent of reducing the crime to manslaughter. The accused was convicted of murder and sentenced to death. The Court of Criminal Appeal substituted a verdict of manslaughter upon the ground that the judge was wrong in applying to a case of drunkenness the test of insanity, and that he ought to have directed the jury in accordance with the rule laid down in *Rex v. Meade*:—

Held, first, that the rule in *Rex v. Meade* did not apply, and that drunkenness was no defence in this case unless it could be established that the accused at the time of committing rape was so drunk that he

* *Present*: LORD BIRKENHEAD L.C., EARL OF READING C.J., VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, LORD BUCKMASTER and LORD PHILLIMORE.

II. L. (E.)

1920

DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.

was incapable of forming the intent to commit it (which was not alleged), inasmuch as the death resulted from a succession of acts, the rape and the act of violence causing suffocation, which could not be regarded independently of each other; secondly, that the trial Judge was mistaken in applying the test of insanity to a case of drunkenness not amounting to insanity, but that, read as a whole, the summing up did not amount to a misdirection.

Held therefore that the conviction of murder should be restored.

Decision of the Court of Criminal Appeal reversed.

APPEAL by the Crown against an order of the Court of Criminal Appeal quashing a conviction of murder and substituting a verdict of manslaughter and a sentence of twenty years' penal servitude.

The respondent was convicted of murder on October 21, 1919, at the Chester Assizes before Bailhache J., and was sentenced to death.

At the trial it was proved or admitted that on July 25 he ravished Ivy Wood, a girl of thirteen years of age, and that in aid of the act of rape he placed his hand upon her mouth to stop her from screaming, at the same time pressing his thumb upon her throat with the result that she died of suffocation.

The respondent pleaded drunkenness as a defence and contended that at the time when the crime was committed his mind was so affected by drink that the crime ought to be reduced from murder to manslaughter.

The evidence is fully stated in the judgment of the Lord Chancellor.

Bailhache J., in summing up, directed the jury that the defence of drunkenness could only prevail if the accused by reason of his drunkenness did not know what he was doing or did not know that he was doing wrong, and he gave as an instance the case of a man who cut the throat of a woman thinking that he was cutting the throat of a pig.

The Court of Criminal Appeal (Earl of Reading C.J., Lord Coleridge J., and Sankey J.) quashed the conviction on the ground of misdirection. They held that the judge was wrong in applying to a case of drunkenness the test of insanity, which was less favourable to the prisoner than the

test imposed by *Rex v. Meade* (1), and that the accused was entitled to have the law stated to the jury as laid down in *Rex v. Meade* (1), which established that the presumption that a man intended the natural consequences of his acts might be rebutted in the case of drunkenness by showing that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous—i.e., likely to inflict serious injury. The verdict would therefore be reduced to that of manslaughter.

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.

1919. Dec. 16, 18, 19. *Sir Gordon Hewart A.-G.* (with him *Sir Ernest Pollock S.-G.*, *Sir Ellis Griffith K.C.*, *Sir Richard Muir*, *G. A. H. Branson*, and *Ralph Sutton*) for the appellant. The general rule is that a man is presumed to intend the natural consequences of his acts. In this case the respondent knew that he was committing rape and, when he put his hand on the girl's mouth to stop her screaming, he knew that he was doing an act of violence in furtherance of the act of rape. That being so, he was guilty of murder: per Stephen J. in *Reg. v. Serné*. (2) With regard to the plea of drunkenness it was objected to the summing up that the learned judge had directed the jury in a way which would have been appropriate in the case of insanity but was not sufficiently favourable to the accused in the case of drunkenness. In the case of insanity, to escape liability, the accused must not have known what he was about when he did the act, or, if he did know, must not have known that the act was wrong. Those are the only two loopholes of escape. But it is said that, if the man was drunk, it must be shown, in addition, that he did not know that what he was doing was dangerous; and the Court of Criminal Appeal have so held on the authority of *Rex v. Meade*. (1) In that case the Court did lay down a rule which is capable of being read as a rule of universal application, and which has since been frequently followed by the Court of Criminal Appeal, but it is difficult to ascribe any reason for that rule, and, having regard to the authorities upon which the rule purports to be based

(1) [1909] 1 K. B. 895.

(2) (1887) 16 Cox C. C. 311, 313.

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU
TIONS
v.
BEARD.
—

and to the express disavowal by the Court of any intention to enlarge the law, the proper inference to be drawn is that the rule, though expressed in general terms, was intended to be limited to the class of case with which the Court was there dealing.

That was a case of a man who killed his wife in a fit of drunkenness by hitting her with a broomstick, and, in considering whether he was guilty of murder, it was material to consider whether he struck her with intent to do her grievous bodily harm and whether he was capable of forming any intent at all. If, as is suggested, the rule is confined to a case in which a particular intent is an essential ingredient of the crime charged, this case is not within it. If on the other hand it is a rule of general application it is wrong. Here the accused was not so drunk as to be incapable of having a criminal intent. It is not suggested that when he committed rape he did not know what he was doing, but the suggestion is that when he put his hand upon the girl's mouth he did not appreciate that he was doing a dangerous act. But if a man commits a felony and in furtherance of it commits an act of violence it is immaterial whether he appreciates the dangerous character of the act or not. *Rex v. Burrow* (1) is the only reported case in which drunkenness has been pleaded as a defence to a charge of rape and there the plea failed. It is still the law, as it always has been, that drunkenness is not an excuse for crime, but, where a particular intent is of the essence of the crime, drunkenness may be material in considering whether that intent is present or not. The general proposition that drunkenness is not and never has been an excuse for crime is clearly stated by Lord Justice Clerk Macdonald in *H.M. Advocate v. M'Donald* (2) and in Hume on Crimes, vol. i, p. 45, c. 1, art. 3, there referred to. And in this respect the law of Scotland does not differ from the law of England.

In support of the supposed rule in *Rex v. Meade* (3) three authorities are relied on by the Court—namely, *Rex v.*

(1) (1823) 1 Lewin, 75.

(2) (1890) 2 White (J. R.), 517.

(3) [1909] 1 K. B. 895.

Grindley (1); *Reg. v. Monkhouse* (2) and *Reg. v. Doherty*. (3) In *Rex v. Grindley* (1) Holroyd J., while recognizing that voluntary drunkenness was no excuse for crime, held that where, as upon a charge of murder, the material question was whether an act was premeditated or done only with sudden heat and impulse, the intoxication of the accused was a circumstance proper to be taken into account; but in *Rex v. Carroll* (4) Park J., with the concurrence of Littledale J., strongly dissented from the ruling of Holroyd J. in *Rex v. Grindley* (1), and said that that learned judge had afterwards retracted his opinion and that there was no doubt that that case was not law. In *Rex v. Burrow* (5) and again in *Rex v. Rennie* (6) Holroyd J. himself states the law as to drunkenness in a manner which appears to be inconsistent with his former opinion. In *Rex v. Pearson* (7) Park J. says that voluntary drunkenness is no excuse for crime, but that drunkenness may be taken into consideration to explain the probability of a party's intention in a case of violence committed on sudden provocation. So in *Rex v. Meakin* (8), which was a case of stabbing, Alderson B., after stating that if a man chooses to get drunk he is answerable for the consequences, says: "With regard to intention, drunkenness may perhaps be adverted to according to the nature of the instrument used." In *Reg. v. Stopford* (9), which was again a case of wounding, Brett J. said that drunkenness would be no excuse unless the accused was so drunk that he was utterly incapable of having any intent. In *Reg. v. Doherty* (10), which was a case of shooting, Stephen J. said, first, that drunkenness was no excuse for crime, and, secondly, that when the crime was such that the intention of the party committing it was one of its constituent elements, regard might be had to the fact that the man was in drink in considering whether he formed the intention necessary to constitute the crime. In *Reg. v. Monkhouse* (2), which

H. L. (E.)

1920

DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.
—

(1) (1819) 1 Russell on Crimes,
7th ed., p. 88n.

(2) (1849) 4 Cox C. C. 55.

(3) (1887) 16 Cox C. C. 306.

(4) (1835) 7 C. & P. 145.

(5) 1 Lewin, 75.

(6) (1825) 1 Lewin, 76.

(7) (1835) 2 Lewin, 144.

(8) (1836) 7 C. & P. 297.

(9) (1870) 11 Cox C. C. 643.

(10) 16 Cox C. C. 306, 308.

H. L. (E.)
 1920
 DIRECTOR
 OF
 PUBLIC
 PROSECU-
 TIONS
 v.
 BEARD.
 —

was a case of wounding with intent to murder, the law was laid down by Coleridge J. substantially in the same way. [He also referred to *Reg. v. Cruse* (1); *Reg. v. Doody* (2); and *Reg. v. Horsey*. (3)]

The result of the authorities is that drunkenness is no excuse for crime, but that in certain cases drunkenness may afford a partial answer—namely, cases in which a particular intent forms an ingredient of the crime, because in the absence of that intent the crime is not committed. In these cases the rule has been relaxed to this extent that in ascertaining the intent drunkenness is an element to be taken into consideration. If the proposition laid down in *Rex v. Meade* (4) is intended as a rule of general application it is not warranted by the authorities cited in the judgment in support of it. It is conceded that that decision, taken in its wider sense, has been frequently acted upon, but it is also true that in some cases the Court of Criminal Appeal has not acted upon it: see *Rex v. Galbraith* (5); *Rex v. Scholey* (6); *Rex v. Crisp* (7); *Rex v. Honeyands*. (8) In the Crown's submission *Meade's Case* (4) was never really intended to fulfil the purpose to which it has undoubtedly been put, and the generality of the language in which the supposed rule is framed must be cut down so as to limit it to the class of cases in which a particular intent is an integral part of the crime; so read the decision is sound. This case does not fall into that class, and the only relevant questions were those put by the judge of first instance: Did the accused know what he was doing and, if he did, did he know that it was wrong? Upon the whole matter the judgment of the Court of Criminal Appeal is wrong and should be set aside, first, because it held that the accused was entitled to the kind of summing up commended in *Rex v. Meade* (4), for the very reason that it was more favourable to the accused than in the case of insanity, and, secondly, because it assumed

(1) (1838) 8 C. & P. 541.

(2) (1854) 6 Cox C. C. 463.

(3) (1862) 3 F. & F. 287.

(4) [1909] 1 K. B. 895.

(5) (1912) 8 Cr. App. R. 101.

(6) (1909) 3 Cr. App. R. 183.

(7) (1912) 7 Cr. App. R. 173.

(8) (1914) 10 Cr. App. R. 60.

that the Court in *Meade's Case* (1) treated that summing up as a pattern summing up in all cases where drunkenness was pleaded as a defence to a crime. [He also referred to *Rex v. Mathieson*. (2)]

Artemus Jones K.C. (with him *Austin Jones* and *Dallas Waters*). There are three questions in this case: 1. Was Bailhache J.'s direction to the jury right or wrong in law? 2. Is the rule laid down in *Rex v. Meade* (1) consistent with the law as laid down in previously decided cases? 3. What direction should be given to juries in future where the defence of drunkenness is pleaded? These questions can only be solved by a reference to the history of the law as regards the effect of drunkenness upon criminal responsibility. There are three definitely marked periods in the development of the law upon this point. The first period was from the time of Coke upon Littleton to 1800, the date of Emlyn's edition of Hale's Pleas of the Crown. The second was from 1800 to 1835 when the doctrine that drink might be pleaded in mitigation first crept into the reports and a controversy arose among the judges as to the limits of that doctrine. The third was from 1835 onwards to *Rex v. Meade* (1) in 1909, by which date the doctrine had hardened into the rule laid down by Darling J. As to the first period Coke's conception was that drunkenness aggravated crime, but according to Sir Matthew Hale the element of aggravation disappeared as time went on and drunkenness was treated as neither an aggravation nor an excuse, but the drunken man was to have the same judgment as if he were in his right senses: Hale's Pleas of the Crown (1800 ed.), vol. i., p. 32. But the writings of both these writers must be regarded from the standpoint of Sir Michael Foster, who in his Crown Cases (1762), p. 131, warned the reader that the ancient writers approached the subject of homicide rather as divines and casuists than as lawyers. From 1800 to 1835 the conception that drunkenness afforded any kind of partial answer was beginning to take root and contradictory views were expressed by the judges, as is shown by the cases referred to by the Attorney-General:

(1) [1909] 1 K. B. 895.

(2) (1906) 25 N. Z. L. R. 879, 880.

H. L. (E.) *Rex v. Grindley* (1); *Rex v. Carroll* (2); *Rex v. Burrow* (3); 1920 *Rex v. Rennie* (4); and *Rex v. Pearson* (5); to which may be
DIRECTOR added *Rex v. Marshall* (6) where Park J. told the jury that
OF drunkenness might be taken into consideration to determine
PUBLIC whether the prisoner acted under a bona fide apprehension
PROSECU- that his person or property was about to be attacked. The
TIONS question whether a crime is murder or manslaughter depends
v. upon malice aforethought, and that is an issue of fact for
BEARD. the jury. The law on this subject is stated by Sir Michael
Foster in his Crown Cases at p. 255. From 1835 the operation
of the doctrine of drunkenness as a palliation of crime began
to be confined to charges of intent, in which case drunkenness
might be used as material for the consideration of the jury in
rebutting intent.

In *Rex v. Meakin* (7) the difficulty first arose in the application of the doctrine to instruments of violence, and Alderson B. laid down the rule that if the prisoner had intemperately used an instrument, not in its nature a deadly weapon, at a time when he was drunk, the fact of his being drunk might induce the jury to infer less strongly a malicious intent in him at the time. In *Reg. v. Cruse* (8) Patteson J. ruled that drunkenness, although no excuse for crime, was often of very great importance in cases when it was a question of intention, and a similar rule was observed by Jervis C.J. in *Reg. v. Moore* (9) and by Wightman J. in *Reg. v. Doody* (10) in dealing with cases of suicide. The language of Coleridge J. in *Reg. v. Monkhouse* (11) and of Stephen J. in *Reg. v. Doherty* (12) amounted to a direction that where the intention of the party charged with a crime was one of its constituent elements the jury might look at the fact that the man was in drink in considering whether he formed the intention necessary to constitute the crime. In 1890 the Lord Justice-Clerk in

- | | |
|---|---------------------------|
| (1) 1 Russ. on Crimes, 7th ed.,
p. 88 n. | (7) 7 C. & P. 297. |
| (2) 7 C. & P. 145. | (8) 8 C. & P. 541. |
| (3) 1 Lewin, 75. | (9) (1852) 3 C. & K. 319. |
| (4) 1 Lewin, 76. | (10) 6 Cox C. C. 463. |
| (5) 2 Lewin, 144. | (11) 4 Cox C. C. 55. |
| (6) (1830) 1 Lewin, 76. | (12) 16 Cox C. C. 306. |

H.M. Advocate v. McDonald (1) directed the jury that, whilst he was doubtful if the principle was consistent with law, yet it was open to the jury to consider whether a crime committed in a drunken frame of mind without motive and without malice, although murder in the strict sense of the law, might not be viewed by them as falling within the category of a case of malicious violence not absolutely murderous. Throughout this current of authority the foundation of the rule was the effect of drink upon a man's mind, since the earliest statement of the doctrine in *Hale* that drink deprived men "of the full use of the reason" was consistent with Lord Coleridge's impressive phrase in summing up in *Meade's Case* (2), "the reason dethroned." From these authorities it is clear that drunkenness was recognized as a partial defence in certain cases long before the decision in *M'Naughton's Case* (3) and that it was treated as distinct from the test of insanity. The objection to Darling J.'s language is more apparent than real as is shown by a comparison of his language with the language used in the cases accepted by the Crown as authorities, such as *Reg. v. Monkhouse* (4) and *Reg. v. Doherty*. (5) The test taken by Darling J. was whether the mind of the accused was so affected by drink that he was incapable of knowing that what he was doing was dangerous—i.e., likely to inflict serious injury. These words appeared to push the rule beyond the borderline covered by authority, but that language when analysed did not mark any deviation from the principle previously laid down, but was appropriate to frame a direction to meet the circumstances of a particular class of case. It is true that there are no words of limitation in that language and that, if the rule is to be regarded as a rule of unlimited application, it is not warranted by authority; but, taking the rule in its narrower sense, it is nevertheless applicable to this case as the intent here was an essential element of the crime. So read, the rule does not differ

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.

(1) 2 White (J. R.) 523.

(4) 4 Cox C. C. 55.

(2) [1909] 1 K. B. 895.

(5) 16 Cox C. C. 306.

(3) (1843) 4 St. Tr. (N. S.) 847.

H. L. (E.) 1920
 DIRECTOR OF PUBLIC PROSECUTIONS
 v.
 BEARD.

materially from Coleridge J.'s summing up, which may be accepted as supplying the correct test. The effect of that summing up was that if the mind of the accused was at the time so obsessed by drink as to render him incapable of forming any particular intent that justified the reduction of the crime from murder to manslaughter. It is not contended that there was not here ample evidence upon which the jury could have found murder if they had been properly directed, but the complaint is that the judge had in effect usurped the functions of the jury because malice aforethought, which is the criterion by which murder is distinguished from manslaughter, is an issue of fact for the jury, and that he had applied the test of insanity to a case of drunkenness. That was a novel doctrine which was not warranted by authority and could not be justified on principle. Bailhache J.'s direction must stand or fall by the illustration which he used to the jury to the effect that they could not take drunkenness into account unless the man was so drunk that he mistook a woman for a pig. If that be not the law the judgment of the Court of Appeal must stand. [He also referred to the editorial notes to *Reg. v. Horsey* (1) and *Reg. v. Luck* (2) as illustrating the reaction which set in during the latter half of the nineteenth century against the theory of constructive murder, and to *Rex v. Lad* (3); *Reg. v. Davis* (4); *Rex v. Lumley* (5); and *Rex v. Griffiths*. (6)]

Sir Richard Muir in reply. The rule that drunkenness is no excuse for crime has never been altered. It certainly remained unaltered in 1816 when Chitty on Criminal Law was first published. That learned author says (vol. iii., p. 725) that "the temporary absence of reason produced by drunkenness, is not, in any case, a legal excuse for the acts which it may occasion or excite," and he adopts Lord Coke's statement that drunkenness is an aggravation of the crime. In none

(1) 3 F. & F. 287, 288.

(2) (1862) 3 F. & F. 483, 491.

(3) (1773) 1 Leach, 96.

(4) (1881) 14 Cox C. C. 563.

(5) (1911) 22 Cox C. C. 635.

(6) Unreported. Cited in Kenny's Outlines of Criminal Law, 9th ed., p. 61.

of the cases cited has any real alteration of the rule been shown. The cases may be summarised thus: Where the presence of a particular state of mind must be established to constitute the crime charged then the drunkenness of the accused may be considered in determining whether he had that state of mind; otherwise there has been no modification of the rule. Provocation by words is no excuse, whether the accused is drunk or sober, but, given a legal provocation, the consequences may be different in the case of a drunken man because the inquiry must be whether the man has lost his control by reason of the provocation, and a drunken man would be more likely to lose his control than a sober one: *Rex v. Thomas* (1); *Rex v. Letenock*. (2) Another illustration of this doctrine is where a special intent constitutes an element of the crime—e.g., assault with intent to inflict grievous bodily harm. Burglary, suicide and receiving stolen goods fall under the same category because in each of these cases the state of the mind of the accused has to be inquired into. Murder is not one of those cases because malice aforethought merely involves that the accused is an evil-disposed person: *Reniger v. Fogossa*. (3) Malice aforethought may exist without any specific intent to murder. Malice in murder and intention are not the same thing. None of the cases cited in *Rex v. Meade* (4) alters or affects the common law rule that drunkenness is no excuse for crime. The respondent has therefore failed to discharge the burden which was upon him. Exception has been taken to Bailhache J.'s summing up; but the learned judge has directed the jury quite correctly although the illustration which he gave was faulty. The test applied to the state of mind of an insane person can never be applied to the state of mind of a drunken man. There was not here any question of delusion, and, in the case of a drunken man, there never can be any evidence of what was in his mind. The practical test of ascertaining the man's mind is different in the two cases. In substance there is no difference between Lord Coleridge's summing up

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
V.
BEARD.

(1) (1837) 7 C. & P. 817.

(3) (1550) 1 Plowd. 1, 19.

(2) (1917) 12 Cr. App. R. 221.

(4) [1909] 1 K. B. 895.

H. L. (E.) in *Meade's Case* (1) and Bailhache J.'s in this case. The words of direction were quite right in themselves, and it is no objection to them that the same words have been used in cases of insanity; the only question is, would the faulty illustration be likely to mislead the jury into thinking that unless the state of mind of the accused was such that he thought a woman was a pig he must be guilty of murder? There is, it is submitted, no foundation for that suggestion.

LORD BIRKENHEAD L.C. The usefulness of these proceedings will depend upon the care with which the doctrines which have been discussed in argument are examined. Their Lordships will therefore require time for consideration. The Home Secretary has intimated that in no case will the death sentence be carried out; otherwise their Lordships would not have thought it right to retire for the recess without reaching a conclusion.

1920. March 5. LORD BIRKENHEAD L.C.

My Lords, Arthur Beard was convicted of murder at Chester Assizes and sentenced to death. The Court of Criminal Appeal quashed the conviction and substituted a verdict of manslaughter and a sentence of twenty years' penal servitude. The case is brought to your Lordships' House under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, upon the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance. The facts which are relevant may be shortly stated.

About 6 P.M. or a little later, on July 25, 1919, a girl of thirteen years of age was sent by her father to purchase some small articles at a shop. About half-past six she was seen entering the gate which leads into Carfield Mill. The only person then at the mill was the prisoner Beard, who was there in the discharge of his duty as night watchman. He proceeded to have carnal knowledge of the girl by force, and, when she struggled to escape from him, he placed his hand over her mouth, and his thumb on her throat, thereby

(1) [1909] 1 K. B. 895.

causing her death by suffocation. There was some but not much evidence that the prisoner was under the influence of intoxicating liquor on the day and at the time in question. This evidence was of a character which is not unusual in crimes of violence, but, in view of the legal problems to which this case has given rise, it requires examination.

A witness met the prisoner on July 25 at 2 P.M. at a public-house where they stayed together drinking for about twenty minutes. This witness states that the prisoner was then neither drunk nor sober. They proceeded together to a club where the prisoner purchased and brought away a bottle of whisky. Another witness, whose position was one of authority over the prisoner, saw him at 6.15 P.M. at the mill and found no indication that he was drunk. About twenty minutes to seven—that is, immediately after the offence had been committed—one Jones came to the mill to meet the prisoner. A few minutes before seven they went to another public-house and had some drink. The prisoner was then introduced for membership of a Trade Union; he answered not unintelligently certain questions which were put to him, and he was, upon the strength of such answers, accepted as a member. When the police came upon the scene in the early morning of July 26 they found him excited and under the influence of drink.

The prisoner was not called at the trial but statements made by him were put in evidence. His first statement to the police officers was admittedly untrue and was concocted by him to explain the finding of the body of the girl. In his later statements he said that he asked the girl to kiss him and that he had a struggle with her and then seemed “to lose his senses,” that he would not have injured the girl if he had not been “sodden and mad with drink” and that “it was the whisky that put the finishing touch to it.”

Counsel for the defence did not dispute the prisoner’s criminal responsibility for the homicide of the girl. The only defence presented was that in the circumstances proved the verdict should be manslaughter and not murder, on the ground that there was no intention on the part of the

H. L. (E.)

1920

DIRECTOR
OF
PUBLIC
PROSECU-
TIONS

v.

BEARD.

Lord
Birkenhead, L.C.

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.

Lord
Birkenhead L.C.

prisoner to cause the girl's death, and that he was in such a drunken condition that he was incapable of knowing that what he was doing was likely to inflict serious injury within the rule laid down by the Court of Criminal Appeal in *Rex v. Meade*. (1)

Bailhache J. carefully reviewed the evidence and gave the following direction of law to the jury: "It is no defence to say, 'I should not have done that wicked thing if I had not been so drunk.' But if he has satisfied you by evidence that he was so absolutely drunk at the time that he really did not know what he was doing or did not know that he was doing wrong, then the defence of drunkenness succeeds to this extent—that it reduces the crime from murder to manslaughter. What I mean by that is a sort of thing like this: supposing he cuts a woman's throat under the impression that he is cutting the throat of a pig, then the crime of murder is reduced to the crime of manslaughter. But if a man says, 'I was mad, and turned into a brute by drink,' it is no defence, unless he satisfies you that he was so far out of his senses that he did not know what he was doing." The jury after a very brief consideration returned a verdict of murder.

In the Court of Criminal Appeal two separate and independent points of misdirection were raised on behalf of the prisoner:—

(1.) That the learned judge should have told the jury that if they were of opinion that the violent act which was the immediate cause of death was not intentional but was an accidental consequence of placing his hand over the mouth of the deceased so as to prevent her screaming, they could and should return a verdict of manslaughter, and

(2.) That the learned judge wrongly directed the jury as to the defence of drunkenness, and gave a direction which was not in accordance with the decision in *Meade's Case* (1) and was applicable only to the defence of insanity.

What
"act"?
Must be
in the
body
of the
deceased
to be
a death

(1) [1909] 1 K. B. 895.

The first objection failed, the Court being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course or in the furtherance of the crime of rape, a felony involving violence. The Court held that by the law of England such an act was murder. No attempt has been made in your Lordships' House to displace this view of the law and there can be no doubt as to its soundness.

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECUTIONS
v.
BEARD.
Lord
Birkenhead L.C.

With regard to the second objection the Court of Criminal Appeal, holding itself bound, by previous decisions of its own, to the view that *Rex v. Meade* (1) laid down a general code, came to the conclusion that the learned judge had given a direction which was calculated to mislead the jury by imposing a test applicable only to the defence of insanity instead of the test, imagined to be generally laid down in *Meade's Case* (1), for application to the defence of drunkenness. The Court was not satisfied that the verdict would have been the same if the proper direction had been given, and substituted a verdict of manslaughter for that of murder.

The appeal to your Lordships' House from this decision raised questions of undoubted importance in the administration of the criminal law. In crimes of violence resulting in death or serious injury it often occurs that the accused is proved to have been drunk or under the influence of drink when he committed the offence; and judges have frequently to direct juries as to the principle upon which they must approach the defence of drunkenness. The language used by judges has varied and different directions are not always easy to reconcile. In *Meade's Case* (1) the authorities were reviewed by the Court of Criminal Appeal, and a rule was laid down which has been treated as general and authoritative by judges of first instance, and by the Court of Criminal Appeal, both in earlier cases and in the present case.

It has been contended before your Lordships that whilst the decision in *Meade's Case* (1) may have been right upon the facts there proved, it is an authority of limited and

(1) [1909] 1 K. B. 895.

H. L. (E.) not of general application ; that in its limited application
1920 *Meade's Case* (1) did not affect the present case, and that
DIRECTOR consequently there was no misdirection.

OF It becomes necessary in view of this contention to consider
PUBLIC the state of the law before *Meade's Case* (1) and to examine
PROSECU the authority of this decision.
TIONS

BEARD. Under the law of England as it prevailed until early in
Lord the nineteenth century voluntary drunkenness was never ✓
Birkenhead L.C. an excuse for criminal misconduct ; and indeed the classic
authorities broadly assert that voluntary drunkenness must
be considered rather an aggravation than a defence. ✓ This
view was in terms based upon the principle that a man
who by his own voluntary act debauches and destroys his
will power shall be no better situated in regard to criminal
acts than a sober man. An early statement of the law is
to be found in *Reniger v. Fogossa*. (2) " If a person that
is drunk kills another, this shall be felony, and he shall be
hanged for it, and yet he did it through ignorance, for
when he was drunk he had no understanding nor memory ;
but inasmuch as that ignorance was occasioned by his own
act and folly, and he might have avoided it, he shall not be
privileged thereby." In *Hale's Pleas of the Crown*, vol. i.,
p. 32, the learned author says : " This vice " (drunkenness)
" doth deprive men of the use of reason, and puts many
men into a perfect, but temporary phrenzy ; and therefore,
according to some civilians, such a person committing
homicide shall not be punished simply for the crime of
homicide, but shall suffer for his drunkenness answerable
to the nature of the crime occasioned thereby ; so that yet
the formal cause of his punishment is rather the drunkenness
than the crime committed in it : but by the laws of England
such a person shall have no privilege by this voluntary con-
tracted madness, but shall have the same judgment as if he
were in his right senses." To the same effect is the passage
in *Hawkins' Pleas of the Crown*, Book I., c. 1, s. 6 : " He
who is guilty of any crime whatever through his voluntary
drunkenness, shall be punished for it as much as if he had

(1) [1909] 1 K. B. 895. (2) 1 Plowd. 1, 19.

been sober." Coke upon Littleton, 247a, similarly treats drunkenness as an aggravation of the offence. "As for a drunkard who is voluntarius dæmon, he hath (as hath been said) no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it." Blackstone, in his Commentaries, Book IV., c. 2, s. III., p. 25, has a passage to the same effect: "As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour."

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.
Lord
Birkenhead L.C.

Judicial decisions extending over a period of nearly one hundred years make it plain that the rigidity of this rule was gradually relaxed in the nineteenth century, though this mitigation cannot for a long time be affiliated upon a single or very intelligible principle.

The case of *Rex v. Grindley*, which was tried at Worcester Assizes in the year 1819, was the first reported judicial decision "that drunkenness put forward as a defence to a charge of crime was a circumstance proper" to be taken into consideration. It was there held by Holroyd J. that although voluntary drunkenness cannot excuse from the commission of a crime, yet where upon a charge of murder the material question is whether an act was premeditated or done only in the stress, heat or impulse of the moment, the fact of the party being intoxicated was a circumstance proper to be taken into consideration: Russell on Crimes, 7th ed., vol. i., p. 88, note b. But this case cannot now be regarded as an authority. Park J., after referring to it in *Rex v. Carroll* (1), said that Holroyd J. had retracted the opinion expressed in that case and he added that there was no doubt that that case was not law. With this view Littledale J. agreed. The language used by Holroyd J. as reported is capable of wide application and perhaps justified the observation made by Park J. that there would be no safety for human life if it were law.

In examining the language used in these and later cases

H. L. (E.) 1920
 DIRECTOR OF PUBLIC PROSECUTIONS
 v.
 BEARD.
 Lord Birkenhead L.C.

it is extremely necessary to bear in mind that the judge when directing the jury with reference to the facts and circumstances of a particular case is not writing in abstracto a treatise upon the criminal law, and that his words must always be considered with regard to the special facts then before the jury. In *Burrow's Case* (1) and in *Rennie's Case* (2) Holroyd J. assumed that drunkenness could not be taken into consideration as a defence to a criminal charge unless the derangement which it caused became fixed and continuous because the drunkenness itself was habitual. The information in these cases both as to the facts and as to the defence is very meagre. In the one case the prisoner urged that he was in liquor, and in the other he pleaded in mitigation that he was drunk. Little can be derived from these reports save that the learned judge declared that only habitual drunkenness causing continuous insanity could be a defence. In *Marshall's Case* (3) Park J. was of opinion that upon an indictment for stabbing the jury might take into their consideration, among other circumstances, the fact of the prisoner being drunk at the time in order to measure the apprehension of attack under which it was alleged that the prisoner acted. In 1831 the same learned judge is reported to have given a similar direction in *Goodier's Case*. (4) In *Pearson's Case* (5), upon an indictment for murder, the defence was that the prisoner was drunk. He had beaten his wife to death with a rakeshank. Park J. said: "Voluntary drunkenness is no excuse for crime drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation."

In these last mentioned cases Park J. treats the drunken condition of the accused as relevant in considering either the extent of the apprehension in the mind of the accused of attack, or the effect upon him of sudden provocation. This class of case was discussed more fully by Parke B. in *Rex v.*

(1) 1 Lewin, 75.

(3) 1 Lewin, 76.

(2) 1 Lewin, 76.

(4) 1 (831) 1 Lewin, 76, n.

(5) 2 Lewin, 144.

Thomas (1) when he expressed a view of the circumstances under which the law as to provocation might justify a verdict of manslaughter instead of murder. The judgments however in these cases diverged into topics not specially helpful in the matter now under debate.

In *Rex v. Meakin* (2) Alderson B. directed the jury that in the case of stabbing with intent to murder, where the prisoner had used a deadly weapon, the fact that he was drunk could not alter the nature of the case. The learned baron expressed the opinion to the jury that "if a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect in the consideration of the malicious intent of the party." The learned baron's view was that drunkenness might affect the jury's view of the intent but that the use of the deadly weapon in that case showed the malicious intent so clearly that the drunkenness of the accused could not alter it.

★ In *Reg. v. Cruse* (3), on an indictment for assault with intent to murder, Patteson J. directed the jury that although drunkenness is no excuse for crime, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet may be guilty of very great violence. This direction was examined in *Reg. v. Monkhouse* (4) by Coleridge J. and Baron Rolfe on an indictment for wounding with intent to murder. Coleridge J. agreed with the substance of Patteson J.'s direction but had some doubt as to the language. After stating that it is a general rule in criminal law that juries are to presume a man to do what is the natural consequence of his act, Coleridge J. said: "If the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was

H. L. (E.)

1920

DIRECTOR
OF
PUBLIC
PROSECU-
TIONSv.
BEARD.Lord
Birkenhead L.C.

(1) 7 C. & P. 817.

(2) Ibid. 297.

(3) 8 C. & P. 541, 546.

(4) 4 Cox C. C. 55, 56.

H. L. (E.) he rendered by intoxication entirely incapable of forming the
 1920 intent charged? Drunkenness is ordinarily neither a
 DIRECTOR OF PUBLIC PROSECUTIONS
 v. BEARD.
 Lord Birkenhead L.C. or to take away from him the power of forming any specific
 intention." Here again the appropriate question seemed to
 be whether the prisoner was so intoxicated as to be entirely
 incapable of forming the intent charged, that is, the intent
 to murder. The words "unless the intoxication was such
 as to prevent his restraining himself from committing the
 act in question" are not to be found in any other judicial
 direction and cannot in my view be explained unless they
 were unscientifically used with the object of indicating the
 defence of insanity. In *Reg. v. Stopford* (1), on an indictment
 for wounding with intent to do grievous bodily harm, Brett J.
 said: "If he was merely so drunk as to put himself in a
 passion, drunkenness would be no excuse; he must have been
 so drunk as to be incapable of knowing what he was doing."
 The question was whether the prisoner had formed the intent
 to murder, and this was answered, in the opinion of the
 learned judge, if the jury thought that his drunken condition
 rendered him incapable of forming the intention.

Next in order we reach the important case of *Reg. v. Doherty* (2), tried by Stephen J. on an indictment for murder, where the question was whether the verdict should be murder or manslaughter. This eminent authority on criminal law said: "Although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime." The learned judge then pointed out that if a drunken man formed an intention to kill another or to do grievous bodily harm to him and killed him his

(1) 11 Cox C. C. 643.

(2) 16 Cox C. C. 306, 308.

drunken intention made him as guilty of murder as if he had been sober. But if his drunkenness prevented his forming such an intention he would only be guilty of manslaughter. If he had not formed such an intention then he had not committed murder, that is, unlawful homicide with malice aforethought. The learned judge then explained that "aforethought" did not necessarily imply premeditation but that it did imply an intention which must precede the act intended. "What, then, is the intention necessary to constitute murder? Several intentions would have this effect; but I need mention only two in this case—namely, an intention to kill and an intention to do grievous bodily harm. If the act which caused death, the firing of the pistol, was done with either of these intentions, Doherty's crime was murder."

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.
Lord
Birkenhead L.C.

The same learned judge discussed the meaning of "malice aforethought" in *Reg. v. Serné* (1), and there pointed out that these words are technical and must be construed not according to the ordinary interpretation of language, but according to a long series of decided cases which have given to them a somewhat artificial sense.

Notwithstanding the difference in the language used I come to the conclusion that (except in cases where insanity is pleaded) these decisions establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved. This does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury

(1) 16 Cox C. C. 311.

H. L. (E.) are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter: per Stephen J. in *Doherty's Case*. (1) This reasoning may be sound or unsound; but whether the principle be truly expressed in this view, or whether its origin is traceable to that older view of the law held by some civilians (as expressed by Hale) that, in truth, it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself; the law is plain beyond all question that in cases falling short of insanity a condition of drunkenness at the time of committing an offence causing death can only, when it is available at all, have the effect of reducing the crime from murder to manslaughter.

The conclusions to be drawn from these cases may be stated under three heads:—

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases. The insane person cannot be convicted of a crime: *Felstead v. The King* (2); but, upon a verdict of insanity, is ordered to be detained during His Majesty's pleasure. The law takes no note of the cause of the insanity. If actual insanity in fact supervenes, as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. In the early cases of *Burrow* (3) and *Rennie* (4) Holroyd J. refused to regard drunkenness as an excuse unless it had induced a continuing and lasting

(1) 16 Cox C. C. 307.

(2) [1914] A. C. 534.

(3) 1 Lewin, 75.

(4) *Ibid.* 76.

condition of insanity. But in *Reg. v. Davis* (1), where the prisoner was charged with wounding with intent to murder, Stephen J. thought (and I agree with him) that insanity, even though temporary, was an answer. The defence was that the prisoner was of unsound mind at the time of the commission of the act, and the evidence established that he was suffering from delirium tremens resulting from over-indulgence in drink. Stephen J. said: "But drunkenness is one thing and the diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible. In my opinion, in such a case the man is a madman, and is to be treated as such, although his madness is only temporary. . . . If you think there was a distinct disease caused by drinking, but differing from drunkenness, and that by reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity."

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.
Lord
Birkenhead L.C.

To the same effect is a decision of Day J. in *Reg. v. Baines*. (2) The defence was that the prisoner was insane when the murder was committed. The evidence proved that the prisoner had on several occasions been under treatment for delirium tremens. He had one attack a week before, and another two days after, committing the crime. Day J. held that it was immaterial whether the insanity was permanent or temporary. The question was whether there was insanity or not; and the learned judge ruled that if a man were in such a state of intoxication that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity.

2. That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration

(1) 14 Cox C. C. 563.

dence, 6th ed., vol. i., p. 898,

(2) Taylor's Medical Jurispru-

The Times, Jan. 25th, 1886.

H. L. (E.)

1920

DIRECTOR
OF
PUBLIC
PROSECU-
TIONSv.
BEARD.Lord
Birkenhead L.C.

with the other facts proved in order to determine whether or not he had this intent.

3. That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

I now come to *Rex v. Meade*. (1) The prisoner was charged with murder. He brutally ill-treated the deceased woman during the night of her death; broke a broomstick over her, and struck her a violent blow with his fist, rupturing an intestine and causing her death. The defence was that he was drunk and did not intend to cause death or grievous bodily harm, and consequently that the verdict should be manslaughter. Lord Coleridge J. directed the jury in the following terms: "In the first place, every one is presumed to know the consequences of his acts. If he is insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive" (meaning intent), "shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter." The objection raised in the Court of Criminal Appeal was that the summing up led the jury to believe that to justify a verdict of manslaughter they must find that the prisoner was insane or in a state resembling insanity, whereas the direction should have been that if there was absence of intention in fact it was manslaughter.

Darling J. in delivering the judgment of the Court reviewed many of the authorities that were cited to your Lordships, and came to the conclusion that the judges by these decisions had attempted to express the doctrine that, where intent

(1) [1909] 1 K. B. 895, 896, 899.

is of the essence of the crime charged, the intent may be disproved by showing that the prisoner was in a condition of drunkenness which made him incapable of forming the intent. The learned judge said: "We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1.) in the case of a sober man, in many ways; (2.) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous—i.e., likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted." The learned judge then expressed the conclusion of the Court that on a true construction, the language used by Lord Coleridge J. did not differ from this rule. The language of the Court of Criminal Appeal contains a proposition of law which, regarded as a rule of general application, would mean that a person charged with a crime of violence may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing what he was doing was dangerous. The Court of Criminal Appeal in the present case, notwithstanding the opinion it had expressed that an act of violence done in furtherance of rape was murder, held that it was bound to follow this decision, and that the jury should have been directed to consider whether Beard, at the time of placing his hand on the child as described, was incapable of knowing that what he was doing was dangerous—that is, likely to cause serious injury.

Your Lordships have had the advantage of a much more elaborate examination of the authorities upon which the rule is founded than was placed before the Court of Criminal Appeal, and I apprehend can have no doubt that the proposition in *Meade's Case* (1) in its wider interpretation is not, and cannot be, supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECUTIONS
v.
BEARD.
Lord
Birkenhead L.C.

(1) [1909] 1 K. B. 895.

H. L. (E.) which has been construed as suggesting that the test of
 1920 the condition of mind of the prisoner is not whether he was
 DIRECTOR incapable of forming the intent but whether he was incapable
 OF of foreseeing or measuring the consequences of the act.
 PUBLIC In this respect the so-called rule differs from the direction
 PROSECU- of Lord Coleridge J., which is more strictly in accordance
 TIONS with the earlier authorities.
 v.
 BEARD.

Lord
 Birkenhead L.C.

Consideration of the judgment, and particularly of Darling J.'s observations that the Court did not wish to extend the ambit of its decision beyond that laid down in the older cases, makes it clear that it was not intended to lay down a rule which should be applied to such a case as the present. In *Meade's Case* (1) the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this case the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's Case* (1), therefore, it was essential to prove the specific intent; in Beard's case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape. I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime—e.g., wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the mens was rea. 'Drunkenness, rendering a person incapable of the intent, would be an answer, as it is for example in a charge of attempted suicide. In *Reg. v. Moore* (2) drunkenness was held to negative the intent in such a case, and Jervis C.J. said: "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?"

My Lords, drunkenness in this case could be no defence

(1) [1909] 1 K. B. 895.

(2) 3 C. & K. 319.

unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not in fact, and manifestly, having regard to the evidence, could not be contended. For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. These acts cannot be regarded separately and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involves is in other words to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment.

H L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECUTIONS
v
BEARD.
Lord
Birckenhead L.C.

Lastly, I come to the actual direction of Bailhache J. It was not a satisfactory direction. The Court of Criminal Appeal held that the learned judge had misdirected the jury because he applied the test of insanity to a case of drunkenness which *e concessis* did not amount to insanity. This distinction, as already shown, has been preserved throughout the cases. And it ought to be so preserved, for the result of a verdict of insanity is not a conviction. That the test suggested by the learned judge is one that would properly be applied in a case of insanity is plain. The questions put: Did the person know what he was doing? or, if not, did he know that he was doing wrong? are in accordance with the opinions expressed by the judges in *M'Naughton's Case* (1); and, in combination with the question whether the prisoner knew what he was doing, the very ambiguous illustration given by Bailhache J. of the meaning that should be attributed to these questions would remove all doubt, if any existed, of the point at which his mind went astray. It is an illustration of a delusion assailing the mind of an insane person, and it is arguable that the impression conveyed to the jury may have been that they could only find a verdict of manslaughter if they found that Beard was the victim of such delusions. As this suggestion had never been made, the effect of such a direction may be made the subject of infinite conjecture. In *Meade's Case* (2) the

(1) 4 St. Tr. (N. S.) 847.

(2) [1909] 1 K. B. 895.

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.
—
Lord
Birkenhead L.C.

Court of Criminal Appeal approved Lord Coleridge's direction because he had sufficiently warned the jury that there was no plea of insanity, and that it was not the defence raised. This warning is absent from Bailhache J.'s direction, and the questions as framed might conceivably (so it is argued) have led the jury to think that insanity was the test.

Neither should the learned judge in my opinion have introduced the question whether "the prisoner knew that he was doing wrong" in a defence of drunkenness, where insanity was not pleaded. It is a dangerous and confusing question to put to a jury, for a drunken man's judgment upon such a question is very likely to be impaired, and it might well be perplexing to a jury to determine whether, if he knew what he was doing, he knew also that he was doing wrong. The general proposition that drunkenness is no excuse for crime may be seriously affected in its operation if such a question is to be a test by which the jury may determine whether the verdict should be murder or manslaughter. It is noteworthy that, notwithstanding that the judges ever since *M'Naughton's Case* (1) in 1843 have had these questions in mind as the test of insanity, there is no single case, known to me, where drunkenness has been the defence, in which the judge has directed the jury to consider whether the prisoner knew that he was doing wrong. Whenever this question has been put the defence has been that there existed insanity caused by drink. I look upon the direction of Bailhache J. as an innovation which is not supported by authority and which should not be repeated or imitated. But while I think that the summing up was in some respects unhappily conceived, I am not prepared, reading it as a whole, to hold in this case that it amounted to, or should be treated as, a misdirection. The defence which is founded upon insanity is one thing. The defence which is founded upon drunkenness is another. The relevant considerations are not identical. It is inconvenient to use the same language in charging juries in relation to different defences. But the portions of the summing up which I have

(1) 4 St. Tr. (N. S.), 847.

criticised were in fact unduly favourable to the prisoner. He cannot complain of them unless they so confused the jury as to prevent them from properly appreciating the true issue, and I am not prepared to lay it down—though I have felt some doubt upon the point—that the actual direction given to the jury by Bailhache J. disabled them from reaching a true conclusion upon the matters which required decision. On the contrary, I think that upon the whole, the matter was so presented to them, though unscientifically, that they have in fact formulated the answer which is decisive even in a case where the defence is founded upon drunkenness.

H. L. (E.)
1920
DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.
Lord
Birkenhead L.C.

In the present case I doubt, without reaching a conclusion, whether there was any sufficient evidence to go to the jury that the prisoner was, in the only relevant sense, drunk at all. There was certainly no evidence that he was too drunk to form the intent of committing rape. Under these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder.

I am, therefore, of opinion that the appeal should be allowed and the conviction of murder restored, and I move your Lordships accordingly.

My Lords, I have only to add that my noble and learned friend Lord Buckmaster has desired me to say that he concurs in the judgment I have just read to your Lordships.

EARL OF READING L.C.J. My Lords, I agree with my noble and learned friend on the Woolsack and have nothing to add.

VISCOUNT HALDANE. My Lords, I agree.

LORD DUNEDIN. My Lords, I agree.

LORD ATKINSON. My Lords, I agree.

H. L. (E.)

LORD SUMNER. My Lords, I agree.

1920

DIRECTOR
OF
PUBLIC
PROSECU-
TIONS
v.
BEARD.

LORD PHILLIMORE. My Lords, I agree.

*Order of the Court of Criminal Appeal reversed, and
cause remitted back to the Court of Criminal
Appeal to do therein as shall be just and
consistent with this judgment.*

Lords' Journals, March 5, 1920.

Solicitor for the Crown: *Director of Public Prosecutions.*

Solicitors for the respondent: *Haslam & Sanders, for
Henry Bostock, Hyde.*

H. L. (E).*

[HOUSE OF LORDS.]

1920

May 10.

ATTORNEY-GENERAL APPELLANT ;

AND

DE KEYSER'S ROYAL HOTEL, LIMITED RESPONDENTS.

*Defence of the Realm—War—Exigencies of the Public Service—Crown—Royal
Prerogative—Right of Crown to take Possession of Land and Buildings
without Compensation—Defence Act, 1842 (5 & 6 Vict. c. 94), s. 19—
Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), s. 1, sub-ss. 1
and 2, and Regulations thereunder.*

The Crown is not entitled as of right, either by virtue of its prerogative
or under any statute, to take possession of the land or buildings of a
subject for administrative purposes in connection with the defence of
the realm without paying compensation for their use and occupation.

In May, 1916, the Crown, purporting to act under the Defence of the
Realm Regulations, took possession of a hotel for the purpose of housing
the headquarters personnel of the Royal Flying Corps, and denied
the legal right of the owners to compensation. The owners yielded
up possession under protest and without prejudice to their rights, and by
a Petition of Right they asked for a declaration that they were entitled

* *Present*: LORD DUNEDIN, LORD ATKINSON, LORD MOULTON, LORD
SUMNER, and LORD PARMOOR.

to a rent for the use and occupation of the premises, or, in the alternative, that they were entitled to compensation under the Defence Act, 1842:—

Held, first, that the suppliants were not entitled to a rent for use and occupation apart from statute, as there was no consensus on which to found an implied contract; secondly, that Regulation 2 of the Defence of the Realm Regulations, issued under the Defence of the Realm Consolidation Act, 1914, when read with sub-s. 2 of s. 1 of the Act, conferred no new powers of acquiring land, but authorized the taking possession of land under the Defence Act, 1842, while impliedly suspending the restrictions imposed by that Act upon the acquisition and user of land; that the Crown had no power to take possession of the suppliants' premises in right of its prerogative simpliciter; and that the suppliants were entitled to compensation in the manner provided by the Act of 1842.

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE

KEYSER'S
ROYAL
HOTEL.

Decision of the Court of Appeal 1919 2 Ch. 197 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Peterson J.

The following statement of facts is taken from the opinion of Lord Dunedin: "In April, 1916, the Army Council, finding it necessary to have accommodation in London for the headquarters personnel of the Royal Flying Corps and for the Design Section of the same, communicated with the Board of Works with a view to their finding a suitable building. That department, which had previously had some tentative offers from the Receiver and Manager in possession of the premises belonging to the De Keyser Hotel Co., Ltd., came to the conclusion that the building known as De Keyser's Hotel would suit. They communicated with the War Office to that effect on April 18, 1916, and on the same date applied to the Receiver to see on what terms he would let. After a short period of ineffectual negotiation the Board of Works, on April 29, informed the Receiver that 'after full consideration of the matter the Board are of the opinion that it will be to the advantage of all concerned to refer the question of the amount to be paid by the Government for the use of such of the hotel premises as will be required to the Defence of the Realm Losses Commission. In these circumstances the Board have no option but to communicate with the War Office with a view to the hotel premises, excluding the shops, being requisitioned under the Defence of the Realm Acts

H. L. (E.) in the usual manner.' Following on this communication
1920 the War Office, on May 1, wrote as follows to the Receiver :—

ATTORNEY-
GENERAL

“DE KEYSER'S ROYAL HOTEL, E.C.

v.
DE
KEYSER'S
ROYAL
HOTEL.

“ ‘ I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations, excluding the shops, the other portions sub-let, and the wine-cellars. . . . I enclose forms of claim for submission to the Defence of the Realm Losses Commission. Compensation, as you are probably aware, is made, ex gratia, and is strictly limited to the actual monetary loss sustained.’

“ On receipt of this letter the Receiver expressed his willingness to facilitate the taking possession, but at the same time he safeguarded his position by the following letter on May 3 :—

“ ‘ I write to inform you that I have instructed Messrs. John Barker & Son, Ltd., to represent me at the making of the inventory of the contents of this Hotel, and also to meet your representative there to-morrow, and to render every facility in order that the necessary work may be done with the utmost expedition. I desire, however, to inform you that the steps which I am taking are without prejudice to the question as to whether the Army Council are within their rights of acquiring possession of the above property under their notice dated 1st May, 1916, as to which I am being advised.’

“ This was followed up by a letter of May 5 to the following effect :—

“ ‘ Referring to the letter of the 1st instant from Captain Cole of the Lands Branch, War Office, it does not seem to me that the acquisition of this building as offices is necessary for the purpose of securing the public safety or the Defence of the Realm, or that such an acquisition is within the powers conferred by the Defence of the Realm Consolidation Regulations, 1914. I must, therefore, enter a protest against the notice contained in the letter if acted upon, and you must understand that anything which I am doing in the matter is without prejudice to the rights

of all parties interested in the Hotel. I think that a fair rent might be fixed by personal negotiation between a representative of the Authority acquiring the building and myself, but failing this I would ask you to agree to submit the question to arbitration.' H. L. (E.)

"To this the Office of Works replied on May 9:—

" 'With regard to your letter of the 5th instant, the premises having been commandeered by the Military Authorities under the Defence of the Realm Acts, the amount of payment to the applicants out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with the applicants' property or business through the exercise by the Crown of its rights and duties in defence of the Realm will be determined by the Defence of the Realm Losses Commission. Having regard, therefore, to para. 4 of your letter it would seem advisable for the claim to be made on a form prepared for the purpose, a supply of which I believe you have, as soon as possible.'

"As no settlement was arrived at, and the Receiver declined to go before the Losses Commission, there was presented a Petition of Right by the De Keyser Company. The relief asked was:—

" ' (1.) A declaration that your suppliants are entitled to payment of an annual rent so long as Your Majesty's Principal Secretary of State for the War Department or Your Majesty's Army Council or any other person or persons acting on Your Majesty's behalf continues in use and occupation of the said premises.

" ' (2.) The sum of 13,520*l.* 11*s.* 1*d.* for use and occupation of your suppliants' premises from the 8th day of May, 1916, to the 14th day of February, 1917.'

" ' (4.) A declaration that your suppliants are entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842.'

"To this, reply was made by the Attorney-General on behalf of His Majesty to the following effect:—

" ' (7.) No rent or compensation is by law payable to

1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—

H. L. (E.)
 1920
 ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.

the Suppliants in respect of the matters aforesaid or any of them either under the Defence Act, 1842, or at all. The Suppliants have been offered on behalf of His Majesty payment of such sum as in the opinion of the Defence of the Realm Losses Commission ought in reason and fairness to be made to them out of public funds in respect of direct and substantial loss incurred and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown as aforesaid of its rights and duties in the Defence of the Realm.'

"The case depended before Peterson J., who dismissed the petition, holding himself bound by the decision of the Court of Appeal in *In re A Petition of Right*. (1) Appeal being taken to the Court of Appeal, that Court, by a majority, Sir Charles Swinfen Eady M.R. and Warrington L.J., Duke L.J. dissenting, reversed the decision of Peterson J., and made the following declaration :—

" 'And this Court doth declare that the Suppliants are entitled to a fair rent for use and occupation of De Keyser's Royal Hotel on the Thames Embankment in the City of London by way of compensation under the Defence Act, 1842.'

"Against this order the present appeal has been brought."

1920. March 1, 2, 4, 5, 8, 9. *Sir Gordon Hewart A.-G.* and *Sir Ernest Pollock S.-G.* (with them *Austen-Cartmell*, *Lowenthal* and *G. A. H. Brandon*) for the Crown. The respondents in their Petition of Right put their claim for compensation under two heads. First, they claim rent against the Crown for the use and occupation of the hotel, and, secondly, they claim compensation under the Defence Act, 1842. The first claim cannot be sustained because a claim for rent for use and occupation is based upon an implied contract, and there was here no consensus : *Churchward v. Ford* (2) ; *Sloper v. Saunders* (3) ; *Phillips v. Homfray* (4). The Crown entered in virtue of the

(1) [1915] 3 K. B. 649.

(3) (1860) 29 L. J. Ex. 275.

(2) (1857) 2 H. & N. 446, 448.

(4) (1883) 24 Ch. D. 439, 461.

Royal Prerogative or under the Defence of the Realm Consolidation Act, 1914, and the Regulations issued thereunder, and they entered under the protest of the respondents. Possession was taken in invitum. That is destructive of mutual consent, which is the basis of a contract. Unless the entry of the Crown was in virtue of the Royal Prerogative or under the Defence of the Realm Regulations the Crown is a mere trespasser, but in that case the respondents have no remedy, for the King can do no wrong. The second claim also fails, for it cannot be maintained that possession was taken under the Defence Act, 1842. Not only did the Crown purport to enter under the Defence of the Realm Regulations, but no part of the machinery provided by that Act was put in operation, and the restrictions imposed by the Act upon the acquisition of land were not complied with : see ss. 16, 19, 23. The Defence of the Realm Consolidation Act, 1914, by s. 1, sub-s. 1, provides that the King in Council has power during the continuance of the war to issue Regulations for securing the public safety and the defence of the realm, and by sub-s. 2 any such Regulations may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of any power under the Defence Acts, 1842 to 1875. Regulation 2 of the Regulations issued under this Act empowers the competent naval or military authority, and any person duly authorized by him "where for the purpose of securing the public safety or the defence of the realm it is necessary so to do," to take possession of any land or buildings, but says nothing about compensation. That is the Regulation which applies here. It is said that that Regulation was really made under sub-s. 2, and was designed to get rid of the fetters imposed by the Act of 1842, notwithstanding its silence on the point ; that it does not itself confer any power to take possession of land or buildings, but that for that power recourse must be had to the Act of 1842. It is submitted that that Regulation was not made with reference to the Act of 1842 at all. Even if it should be thought that the purpose and effect of the Regulation was to remove the restrictions imposed by that Act—the service of notice to treat and the certificate of the Lord-Lieutenant as to the necessity of

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

H. L. (E.) 1920
 ATTORNEY-GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.

taking the land—it would still be a question of fact whether the Crown proceeded under that Act or not, and on the facts of this case that contention cannot be maintained. If then the House is satisfied that possession here was not taken either under an implied agreement or under the Act of 1842, that is sufficient for the dismissal of this Petition of Right, for the suppliants' claim is put on those two grounds only. But it is submitted further that the entry of the Crown was in right of the Royal Prerogative and under Regulation 2, which recognizes that right. That is a right, not to deprive the subject of his property, but to make a temporary use of the subject's property during the exigencies of war for such period as may be necessary for the defence of the realm, without giving rise to a legal obligation to pay compensation, upon condition of making good the damage done to the property by the Crown's possession. It is a right which arises upon an emergency created by enemy action, and upon nothing else, and it is founded upon the principle that upon such an emergency private convenience must yield to public necessity. There is nothing unreasonable in the origin of this right, which has been recognized in several ancient authorities : *Rex v. Hampden* (1); *The King's Prerogative in Saltpetre* (2); *Hole v. Barlow* (3); *In re A Petition of Right*. (4) The last cited case, which was followed in *Sheffield Conservative Club v. Brighton* (5), subsequently went to the House of Lords, but was settled, and the House expressed no opinion upon the question at issue. (6) In none of those cases is there any trace of any obligation to pay compensation on the exercise of that prerogative. "The municipal law of this country does not give compensation to a subject whose land or goods are requisitioned by the Crown" : per Lord Parker in *The Zamora*. (7) The right claimed by the Crown, whether by virtue of the Royal Prerogative or under the Defence of the Realm Regulations, to use the land of a subject during the continuance

(1) (1637) 3 How. St. Tr. 825,
 1195.

(2) (1606) 12 Rep. 12.

(3) (1858) 4 C. B. (N. S.) 334, 345.

(4) [1915] 3 K. B. 649.

(5) (1916) 85 L. J. (K. B.) 1669.

(6) [1916] W. N. 311.

(7) [1916] 2 A. C. 77, 100.

of an emergency created by war is recognized and confirmed by the Defence of the Realm (Acquisition of Land) Act, 1916. That Act was passed at a time when the decision of the Court of Appeal in *In re A Petition of Right* (1) was in full force, and must be regarded as giving statutory authority to that decision: *Attorney-General v. Clarkson*. (2) Sect. 1, sub-s. 1, of that Act provides that possession by the Government of land occupied for the defence of the realm, "whether in exercise or purported exercise of any prerogative right of His Majesty, or of any powers conferred by or under any enactment relating to the defence of the realm, or by agreement, or otherwise," may be continued for a limited period after the termination of the war. That is an express statutory recognition of the power of the Crown to acquire land for purposes of defence by virtue of its prerogative. Sub-sect. 3 of that section provides for payment of rent by the Government for such continuance of possession, to be assessed in the manner provided by para. 6 of the Schedule to the Act. Sect. 4 provides that any land acquired under that Act may be used for any Government department for the purpose for which it was used during the war or for any other purpose for which it could have been used had the land been acquired under the Defence Acts, 1842 to 1873. Under the law as laid down by the majority of the Court of Appeal the land here was taken under the provisions of the Act of 1842, shorn of certain fringes, and rent was payable whether the war was in force or not. If those judgments are right the rent has to be assessed by the machinery of the Act of 1842 as subsequently amended, and that rent would continue after the war had ceased. That proceeds upon a false assumption, and makes the provisions of the Act of 1916 not only futile but ridiculous. The whole scheme of that Act is inconsistent with the theory that this land was taken under the Act of 1842. Against this body of authority what is adduced by the respondents? They say, first, that no authority can be found in which the claim of the Crown to enter into temporary occupation during an emergency without paying

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.

(1) [1915] 3 K. B. 649.

(2) [1900] 1 Q. B. 156.

H. L. (E.) compensation has been upheld. But the case should be put the other way round. No authority has been produced in which a claim for compensation in such circumstances has been presented. Then the respondents set up certain statutes as an answer to the Crown's contention. But before considering those statutes it is important to ascertain the nature of the prerogative claimed by the Crown in this case. It is a prerogative which arises and exists in a period of emergency, and it does not extend to a permanent taking of the land. Therefore no assistance can be derived from statutes which provide for the permanent acquisition of land by the Crown. All the statutes relied on by the respondents are of that character, and are not in *pari materia* with the prerogative claimed in this case. [They referred to 38 Geo. 3, c. 27; 43 Geo. 3, c. 55; 44 Geo. 3, c. 95.] This legislation culminated in the Defence Act, 1842, which is framed upon the earlier statutes. This Act, unlike its predecessors, was passed in a time of peace; it contemplates a period of peace no less than a period of war, and it provides suitable though cumbrous machinery for acquiring land more or less permanently for the purposes of defence. It is supplemental to and distinct from the special prerogative claimed in this case, and the two rights can co-exist. If the statute reproduces some features of the prerogative that does not operate as a merger *pro tanto* of the prerogative. The prerogative is not taken away by a statute dealing with the same subject-matter unless that intention plainly appears from the provisions of the Act: *Wheaton v. Maple*. (1) "In general, the Crown is not bound by a statute unless expressly mentioned, or referred to by necessary implication": per Cotton L.J. in *In re Henley* (2); *Coomber v. Berks Justices* (3); Bacon's Abridgement "Prerogative": (E) 5; Chitty on Prerogatives of the Crown, p. 383. It is a part of the King's duty to protect and defend the realm: *Attorney-General v. Tomline* (4); and the Courts have upheld very drastic Regulations made for that purpose: *Rex v. Halliday* (5); *Lipton v.*

(1) [1893] 3 Ch. 48, 64.

(4) (1880) 14 Ch. D. 58, 61, 66.

(2) (1878) 9 Ch. D. 469, 482.

(5) [1917] A. C. 260.

(3) (1883) 9 App. Cas. 61, 65.

Ford. (1) Not only is the Defence Act of 1842 not referred to in the correspondence in this case, but that Act does not contemplate in any special way the emergencies of war. In such emergencies it is possible to suggest many uses of land to which the machinery of that Act is wholly inapplicable. For these reasons it is submitted that the Act of 1842 leaves the prerogative here claimed entirely untouched. Further, the remedy by Petition of Right does not apply to a case of this description. "The only cases in which the Petition of Right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the Crown or to the public service": per Cockburn C.J. in *Feather v. Reg.* (2); *Thomas v. Reg.* (3); *Windsor, &c., Ry. Co. v. Reg.* (4); Petition of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7.

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.

Sir John Simon K.C. and *Leslie Scott K.C.* (with them *W. Copping*) for the respondents. The argument on behalf of the Crown shows some misapprehension as to the effect of the legislation which led up to the passing of the Defence Act, 1842. It is a misapprehension to say that that Act is an Act dealing with the permanent or lasting acquisition of land as distinguished from temporary occupation. It deals with both cases, and furnishes a complete code with reference to the acquisition and occupation of land by the Crown for the defence of the realm; and it secures to the subject a right of compensation in each case. The Act of 1798 (38 Geo. 3, c. 27) and the Act of 1803 (43 Geo. 3, c. 55) were both temporary Acts passed at very critical times in the history of the country, and they covered the same ground. Those Acts contemplated the taking of land by the Crown, not permanently, but during such period as the exigencies of the public service should require, but the land was not to be

(1) (1917) 33 Times L. R. 459.

(2) (1865) 6 B. & S. 257, 294.

(3) (1874) L. R. 10 Q. B. 31.

(4) (1886) 11 App. Cas. 607,
613.

H. L. (E.)
 1920
 ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.

taken without the consent of the subject, except upon a certificate of the Lord-Lieutenant as to the necessity or expediency of taking it, and payment was provided for in every case. Those Acts were followed by the Act of 1804 (44 Geo. 3, c. 95), which was a permanent Act, and was passed to remove a doubt which had arisen under the Act of 1803, whether the Crown could take land for the exigencies of the public service for a definite period. Sect. 10 dealt with the exercise of the power of taking land on an invasion, and covered the case of occupation upon a sudden emergency and also the case of occupation for a term, and the Act provided machinery for the assessment of the compensation. The compensation so provided was not limited to the case where the Crown acquired the land of the subject out and out or for a term, but applied equally to the temporary use and occupation of the land during the period of the exigency. That Act was the foundation of the Act of 1842, which again dealt with both kinds of acquisition, and provided similar machinery for compensation. If then the Act of 1842 governs this matter, it provides a code which precisely covers the case to be dealt with here. Then, has the Crown another right, covering the same ground, under which it can do precisely the same thing without paying compensation to the subject? When Parliament has provided that on the happening of a certain state of things certain statutory consequences follow, it is idle for the Crown to repudiate the statute and to refuse to abide by those consequences. The real question here is not whether the Crown has lawfully entered the premises—that has never been denied—but whether the Crown can lawfully refuse compensation. The prerogative has been defined by a learned author as “the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.” It is the ultimate resource of the executive, and when there exists a statutory provision covering precisely the same ground there is no longer any room for the exercise of the Royal Prerogative. It has been taken away by necessary implication because the two rights cannot live together: *Gorton Local Board v. Prison*

London

Commissioners. (1) The prerogative is merged in the higher title derived by the Act of Parliament : *New Windsor Corporation v. Taylor*. (2) See also Bacon's Abridgement, "Prerogative" (E) 5; Rolle's Abridgment, vol. ii., p. 179, "Prerogative Le Roy" (Y) 5; *Crooke's Case*. (3) No doubt, in the actual stress of military exigencies, the Crown has the right to go in invitum upon the land of any subject, but in such an emergency a similar right is given to the subject; and the act of the Crown is to be justified not specially as an exercise of the prerogative, but as an act of necessity. Thus in *Maleverer v. Spinke* (4) it was recognized that the commission of a tort might be justified on the ground of the public good; "as in time of war a man may justify making fortifications on another's land without licence; also a man may justify pulling down an house on fire for the safety of the neighbouring houses; for these are cases of the common weal." In any case the right of the Crown to occupy the land of a subject compulsorily for the purpose of erecting bulwarks or cutting trenches in order to repel an invasion by the enemy differs essentially from the right alleged in this case to take land for the purpose of housing the administrative staff of a military department in time of war. The distinction between these two rights is not to be explained by the difference in the manner of conducting warfare in modern times, but is a distinction in kind. In the latter case the Crown is not entitled in virtue of its ancient prerogative apart from statute to take the land of a subject compulsorily. This ancient prerogative is a far narrower thing than has been suggested in argument, and is a right exercised to deal with a concrete emergency : *Hampden's Case*. (5)

Further, the exercise of this power of taking possession of the land of a subject in invitum for the exigencies of the public service does not connote that the subject is left without any right of compensation, and no case can be found in which this right has been exercised without payment. See *Newcastle*

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—

(1) [1904] 2 K. B. 165n., 167n.

(2) [1899] A. C. 41, 49.

(3) (1690) 1 Shower, 208.

(4) (1537) 1 Dyer, 35b, 36b.

(5) 3 St. Tr. 825, 1162.

H. L. (E.) *Breweries v. Rex* (1); *Reg. v. Abbott*. (2) [Upon this point they also referred to Maitland's Constitutional History, pp. 418, 419, 461; *Rex v. Broadfoot* (3); Selden's *Mare Clausum*, Book II., c. xx., pp. 352-4; Rushworth's Historical Collections, Part III., vol. i., p. 655; 18 Edw. 3, Stat. 2, c. 7.] Assuming that the respondents have succeeded in establishing the following propositions: 1. That the Defence Acts, 1798-1842, occupy the field, not only when the Crown takes an estate from a subject, but also when the Crown temporarily takes possession of the premises of a subject, for the defence of the realm; 2. that it follows by necessary implication that, whatever prerogative the Crown might have had originally, it cannot since the passing of these statutes have a residue of prerogative power to do the same thing; 3. that there is nothing either in the nature of the power or in the authorities which lends colour to the view that the subject is deprived by the exercise of this power of his right to compensation; then can it be said that a Regulation made under the Defence of the Realm Consolidation Act, 1914, has altered the whole of that law? Suppose a Regulation which said in express terms that the historic rights of the subject were thereby swept away, would such a Regulation be within the terms of the Act? Everything done by a Regulation made under this Act must be done for securing the public safety and the defence of the realm, and a Regulation which authorizes the taking away of a right to compensation from a person who would otherwise be entitled to it cannot be justified as a compliance with the Act, because it has nothing to do with the purposes for which alone Parliament gave authority for Regulations to be made: *Newcastle Breweries v. Rex*. (1) If the respondents are correct in their view of the rights of the subject up to August, 1914, this Act ought not to be construed as abolishing the right of the subject to payment for being dispossessed of his property. Then as to the remedy, procedure by petition of right is open to the subject whenever

(1) (1920) 36 Times L. R. 276.

(2) [1896] 2 I. R. 362, 405.

(3) (1743) Foster's Cro. Cas. 154, 160.

the question is whether the subject has a legal right to the payment of money by the Crown. If the claim has a legal basis it need not have a consensual basis in the full sense; and there are many cases where a contract is implied by law where there is no suggestion of any consensus in fact: see *Harding v. Metropolitan Ry. Co.* (1) The only limitation upon this mode of procedure is that the King can do no wrong. In this case there is no allegation of a tort. It is conceded that the Crown has entered lawfully, and the only question at issue is whether certain legal consequences follow from that entry. It is a fallacy to say, as has been contended on behalf of the Crown, that the remedy by petition of right is limited to certain defined classes of actions. This procedure was designed to ascertain the legal relations existing between the subject and the King in a manner consistent with the dignity of the King. It is obviously impossible to obtain a mandamus against the King, and therefore all that is sought by this procedure is a declaration of the rights of the subject in the full assurance that the Crown will give effect to those rights: *Monckton v. Attorney-General* (2); *Blundell v. Rex* (3); *De Bode's Case* (4); Manning's Exchequer Practice, p. 84.

The attempt to use the Defence of the Realm (Acquisition of Land) Act, 1916, in support of the Crown's contention completely breaks down. That Act was passed after the date when possession was taken by the Crown in this case, and it deals with the de facto situation, and does not purport to alter the law at all upon any matter relevant to the present inquiry. It is not limited to land taken under some exigency of war, but covers all land used for any purpose of the present war, and land taken under any statute for the defence of the realm. That will include the Defence Acts, under which compensation is payable. If for the reasons advanced on behalf of the respondents these lands were taken under the Defence Act, 1842, it is not necessary to inquire into the extent of the prerogative, but it is submitted that the prerogative

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.

(1) (1872) L. R. 7 Ch. 154.

(3) [1905] 1 K. B. 516.

(2) (1850) 2 Mac. & G. 402, 412.

(4) (1845) 8 Q. B. 208, 273, 274.

H. L. (E.) 1920 has never gone the length of asserting that a subject who has been dispossessed of his land by the Crown is not to be paid.

ATTORNEY-GENERAL v. DE KEYSER'S ROYAL HOTEL. *Sir Ernest Pollock S.-G.* in reply. The Defence Act of 1842 conferred on the Crown certain restricted powers of taking lands, but did not exhaust the prerogative of the Crown in that regard. Side by side with that Act there existed a residue of prerogative power, which enabled the Crown to enter into temporary occupation of the land of a subject in the exigencies of war, and that residue of prerogative power was exercised under the Defence of the Realm Acts and the Regulations made thereunder. The question ultimately turns upon the interpretation to be put upon Regulation 2. That Regulation was originally issued under the first Defence of the Realm Act of 1914 (4 & 5 Geo. 5, c. 29), which contained no provision corresponding to sub-s. 2 of s. 1 of the Defence of the Realm Consolidation Act, 1914, and contained no reference to the Act of 1842. By the later Act power was given to the Legislature to issue Regulations providing for the suspension or modification of the restrictions imposed by the Defence Act, 1842, but that power was never exercised, and when the Defence of the Realm Regulations were repromulgated Regulation 2 remained as it was before. That Regulation ought to be construed to-day in the same way as it would have been construed at the date when it was originally issued, and so construed it can have nothing to do with the Act of 1842. The powers contained in the Regulations were fresh powers given to the executive, and were a portion of the residue of authority vested in the Crown.

The House took time for consideration.

1920. May 10. LORD DUNEDIN (after stating the facts). My Lords, I shall mention first, in order to put it aside, one argument put forward by the respondents. It was that the Crown should pay a reasonable sum for use and occupation of the premises upon the ground of an implied contract, the entry of the Crown to the premises having been permitted by the Receiver and taken by the Crown in virtue of the Receiver's

permission. The simple answer to this argument is that the facts as above recited do not permit of its application. In any case of implied contract there must be implied assent to a contract on both sides. Here there was no such assent. There was no room for doubt as to each party's position. The Crown took as a right, basing that right specifically on the Defence of the Realm Act. The Receiver did not offer physical resistance to the taking, and was content to facilitate the taking. He emphatically reserved his rights, and gave clear notice that he maintained that the Crown was wrong in its contention, and that no case for taking under the Defence of the Realm Act had arisen : in other words, that the Crown had, under the circumstances, according to their proposals, unlawfully taken. To spell out of this attitude on either side an implied contract is to my mind a sheer impossibility.

Now, that the act of taking by the Crown was in itself legal is necessarily admitted by both sides. It is the basis of the case for the Crown, who said at the time that they took under the Defence of the Realm Act, and now add in argument that, whether that was so or not, they took de facto, and can justify that taking under the powers of the prerogative. It must necessarily be admitted by the respondents, for if taking in itself was purely illegal, then it would be a tort not committed by the Crown, who cannot commit a tort, but by the officers of the Crown, and the petition of right would not lie. The question in the case is therefore narrowed to one point and one point only : the Crown having legally taken, is it bound to pay compensation ex lege, or is the offer to pay compensation ex gratia, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands ?

My Lords, I have already quoted the letter of May 1, which shows that the War Office propose to take possession of the hotel under the Defence of the Realm Regulations, but in the argument in the Court below and before your Lordships the taking has been justified by the power of the prerogative alone, and there has been a very exhaustive citation of authority on the powers of the Crown in virtue of the prerogative.

I do not think it necessary to examine and comment on the

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
Lord Dunedin.

H. L. (E.) various cases cited. The foundations of the contention are
 1920 to be found in the concessions made in the speech of
 ATTORNEY-GENERAL v. DE KEYSER'S ROYAL HOTEL. Lord Dunedin. Mr. St. John in *Hampden's Case* (1), and in the opinion of the consulted judges in the *Saltpetre Case* (2)—I do not quote them, for they are fully quoted in the judgment of the Courts below—and in the opinions of the learned judges in *In re A Petition of Right*. (3) The most that could be taken from them is that the King, as *suprema potestas* endowed with the right and duty of protecting the Realm, is for the purpose of the defence of the realm in times of danger entitled to take any man's property, and that the texts give no certain sound as to whether this right to take is accompanied by an obligation to make compensation to him whose property is taken. In view of this silence it is but natural to inquire what has been the practice in the past. An inquiry as to this was instituted in this case, and there has been placed before your Lordships a volume of extracts from the various records. The search is admittedly not exhaustive, but it is sufficient to be illustrative. The learned Master of the Rolls in his judgment has analysed the documents produced. He has divided the time occupied by the search into three periods—the first prior to 1788, then from 1788 to 1798, and the third subsequent to 1798. The first period contained instances of the acquisition of private property for the purposes of defence by private negotiation, in all of which, it being a matter of negotiation, there is reference to the payment to be offered for the land taken. With the second period we begin the series of statutes which authorize the taking of lands, and make provision for the assessment of compensation, the statutes being, however, of a local and not of a general character, dealing each with the particular lands proposed to be acquired. The third period begins with the introduction of general statutes not directed to the acquisition of particular lands, and again making provision for the assessment and payment of compensation.

I shall refer to the statutes presently, but, speaking generally, what can be gathered from the records as a matter of

(1) 3 How. St. Tr. 825.

(2) 12 Rep. 12.

(3) [1915] 3 K. B. 649.

practice seems to resolve itself into this. There is a universal practice of payment resting on bargain before 1708, and on statutory power and provision after 1708. On the other hand, there is no mention of a claim made in respect of land taken under the prerogative, for the acquisition of which there was neither bargain nor statutory sanction. Nor is there any proof that any such acquisition had taken place. My Lords, I do not think that from this usage of payment there can be imposed on the Crown a customary obligation to pay, for once the taking itself is admitted to be as of right the usage of payment so far as not resting on statutory provision is equally consistent with a payment *ex lege* and a payment *ex gratia*. On the other hand, I think it is admissible to consider the statutes in the light of the admitted custom to pay, for, in the face of a custom of payment, it is not surprising that there should be consent on the part of the Crown that this branch of the prerogative should be regulated by statute. It is just here that the full investigation into the statutory history which has been made in this case, and of which the Court of Appeal and your Lordships have had the advantage, serves to dislodge a view which I cannot help thinking was very influential in determining the judgment of the Court of Appeal in the case of *In re A Petition of Right*. (1) Digressing for the moment to that case, I am bound to say that I do not think that this case can be distinguished from that in essential particulars. The existence of a state of war is common to both. As to the necessity for the taking over of the particular subject, the Crown authorities must be the judge of that, and the evidence as to the necessity for the occupation of these premises in the opinion of the Crown advisers is just as distinct and uncontradicted in this case as it was in that. I confess that had I been sitting in the Court of Appeal I should have held the same view as was expressed by Peterson J.—namely, that it was ruled by the case of *In re A Petition of Right*. (1) This, however, is immaterial, for *In re A Petition of Right* (1) is not binding on this House, and it would have been equally proper for the learned Master of the Rolls, Sir Charles Swinfen Eady,

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
Lord Dunedin.

(1) [1915] 3 K. B. 649.

H. L. (E.) and for Warrington L.J., who had obviously changed his opinion on further argument, to give your Lordships the benefit of the opinions they had come to on the merits, even if, being unable to distinguish between the two cases, their judgment had been formally given to the opposite effect from what it was.

1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Dunedin.

Now the view which I think prevailed in *In re A Petition of Right* (1) was that the prerogative gives a right to take for use of the moment in a time of emergency, that when you come to the Defence Acts of 1803 and 1842 you find a code for the taking of land permanently in times of peace as well as of war, and that consequently the two systems could well stand side by side; and then, as there was no direct mention of the prerogative in the statutes, you were assisted by the general doctrine that the Crown is not bound by a statute unless specially mentioned. That in cases where the burden or tax is imposed the Crown must be specifically mentioned no one doubts. Instances are given by the Master of the Rolls in the cases of *Wheaton v. Maple* (2) and *Coomber v. Berks Justices* (3), and there are many others. None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: "What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?"

The prerogative is defined by a learned constitutional writer as "The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

(1) [1915] 3 K. B. 649. (2) [1893] 3 Ch. 48, 64.
(3) 9 App. Cas. 61, 66.

I have read very carefully and considered the judgments delivered in *In re A Petition of Right* (1), and it is, I think, apparent that the view of the series of statutes there presented was that the general statutes had their inception for the purpose of permanent acquisition in times of peace as well as of war, but in the fuller citation that has been made in this case we find that this is not so. It is somewhat significant that in the first statute of all dealing with the acquisition of land, 7 Anne, c. 26, we have a reference to the usual methods that had been taken to prevent extortionate demands, and the usual methods are said to be a valuation by jury. It is also significant that in the whole statutory series there is no trace of any claim to take under the prerogative and not to pay. On the contrary, for instance, in 31 Geo. 2, c. 39, date 1757, we find during the war (that is, the Seven Years' War) land had actually been taken, that extravagant claims were feared, and then that is followed by a statutory provision for vesting the lands taken in trustees till the price may be paid as fixed by assessment by jury, and then on payment the trustees are to hold for His Majesty. But the real point seems to me to be that we find that even before the idea of a general Act, that is to say, when the Acts were limited in time to the continuance of a war, there is provision made for a temporary taking, and for payment; or, in other words, for getting by statute, with the concomitant obligation of payment, that very temporary possession which, according to the view expressed above, it was the function of the prerogative to provide free of charge, leaving it to statute to provide for a permanent acquisition. Thus, in 38 Geo. 3, c. 27, date 1798, in the middle of the war with the revolutionary Government of France which began in February, 1793, and ended with the Peace of Amiens in March, 1802, we find in s. 10 powers given to His Majesty to authorize a general officer to mark out any piece of ground wanted for the public service, and to treat with the owner thereof or any person or persons having any interest therein "for the possession or use thereof, during such time as the exigence of the service shall require," and,

H L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Dunedin.

H. L. (E.) in case of refusal, to take the land and get the value assessed by jury. This Act was limited to the continuance of the war. War again broke out against France on April 29, 1803, Napoleon being First Consul for life, and 43 Geo. 3, c. 55, June, 1803, repeated the provisions of 38 Geo. 3, c. 27. It again was limited to the duration of "the present hostilities with France." Then in 1804, there being still war with France and a prospect of invasion by Napoleon, 44 Geo. 3, c. 95, was passed. This had no temporary clause. It recited that doubts had arisen as to whether the Act of 1803 authorized permanent acquisition, and it proceeded to provide for temporary taking, using the old phrase "for such time as the exigence of the public service shall require," and contained the old arrangements for assessment of the payment by a jury. This Act was the forerunner of, and was superseded by, the existing Act of 1842, which again repeats the words "during such time as the exigence of the public service shall require." This Act was passed in time of peace. It thus appears that the inception of the legislation was during that very period, and connected with that very requirement which, if the argument in *In re A Petition of Right* (1) was sound, was satisfied by the powers of the prerogative alone—that is to say, it dealt with temporary acquisition during a period of war, and the Act of 1842 only continued that legislation. It is therefore impossible, in my opinion, to say that the whole field of the prerogative in the matter of the acquisition of land or rights therein was not covered by the Act of 1842. It follows from what I have said above that there is no room for asserting an unrestricted prerogative right as existing alongside with the statutory powers authorizing the Crown to acquire on certain terms. The conclusion is that the Crown could not take the petitioners' premises by the powers of the prerogative alone.

I now come to the Defence Act of 1914, the Act under the powers of which the Crown professed to take. Now, just as the statutes must be interpreted in view of what the rights and practices antecedent to them had been, so we must look

1920
 ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 —
 Lord Dunedin.

at the Defence of the Realm Act in view of the law as it stood previous to its passing. The Defence of the Realm Consolidation Act, 1914, passed on November 27, 1914, declares by s. 1, sub-s. 1, that His Majesty has power during the continuance of the war to issue regulations for securing the public safety and the defence of the realm. Sub-sect. 2 says that any such regulations may provide for the suspension of any restrictions on the acquisition or user of land under the Defence Acts, 1842 to 1875. Pursuant to this Act a Regulation was issued on November 28, 1914, which empowered the competent naval or military authority, or any person authorized by him, "where for the purpose of securing the public safety or the defence of the realm it is necessary so to do" (sub-s. (a)) to take possession of any land, and (sub-s. (b)) to take possession of any buildings. It is clear that under these sub-sections the taking possession of De Keyser's Hotel was warranted, but there was no necessity for the public safety or the defence of the realm that payment should not be made, such payment being, on the hypothesis that the views above expressed as to the Act of 1842 were sound, a necessary concomitant to taking. The very structure of the Act points the same way. Why provide by sub-s. 2 for the suspension of restrictions under the existing Act which allowed of taking land, if a mere taking simpliciter was all that was wanted? The thing may be tested in another way. Suppose the Regulation as to taking land had had added to it the words "without making any payment therefor." That would have left no doubt as to the Regulation. The question would have been, was it ultra vires? It could only be intra vires if it were necessary for the safety of the realm, and that is the same question over again, and again the existence of the powers of sub-s. 2 of the Act can be appealed to. The argument is practically analogous to the argument that prevailed, and I think rightly prevailed, in the judgment of Salter J. in the case of *Newcastle Breweries Co. v. Rex* (1), where the taking of the goods was held a necessity, but the extrusion of the subject, where goods were taken, from the King's Courts

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
Lord Dunedin.

(1) 36 Times L. R. 276.

H. L. (E.) in the event of non-agreement as to value was not. It will have been noticed that the Regulation which authorizes the taking of land says nothing about doing away with restrictions or, in other words, does not specifically purport to be made in virtue of sub-s. 2 of the Act. None the less, it may well be held to be virtually so. There are various restrictions as to the initiation of proceedings, notices, etc., which I have not thought it necessary to quote. These may be taken as swept away by the simple authority to take. There remains the question whether the obligation to pay can be considered as a restriction, and also swept away. I think it cannot. The word "restriction" seems to me appropriate to the various provisions as to notice, but not at all appropriate to the obligation to make compensation.

There are two other matters as to which I should say a few words. The learned Attorney-General laid great stress on the words of s. 1 of the Defence of the Realm (Acquisition of Land) Act, 1916, which, providing for a continuation of powers after the war, begins thus:—

"Where, during the course of or within the week immediately preceding the commencement of the present war, possession has been taken of any land by or on behalf of any Government Department for purposes connected with the present war, whether in exercise or purported exercise of any prerogative right of His Majesty, or of any powers conferred by or under any enactment relating to the defence of the realm, or by agreement, or otherwise, it shall be lawful, etc."

This, he argued, was a statutory confirmation and declaration of the power to take under the prerogative. So it may be, but, if the views expressed in the first part of my remarks are right, it leaves those views untouched. And further, the words used really amount to this. They do not in any way define the rights which the Crown has to take, but they say, if the Crown has de facto taken quocunque modo, then it shall be lawful as thereafter provided to continue possession.

The other point is as to the remedy. I am of opinion that a Petition of Right lies, for it will lie when in consequence of

1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Dunedin.

what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but, as already insisted on, what was done here, so far as the taking of the premises was concerned, was perfectly legal.

On the whole matter I am therefore of opinion that the judgment of the Court of Appeal was right and ought to be affirmed, and the Appeal dismissed with costs.

LORD ATKINSON. My Lords, the facts have been already stated by my noble and learned friend who has preceded me. If anything be clear in this important case, it is, on the correspondence already referred to, this : that the Army Council, acting through their agent, Captain R. C. Coles, did not claim to take possession of the respondents' hotel by virtue of the unrestricted and unqualified prerogative of the Crown. On the contrary, they justified their action, and claimed the right to do what they, in fact, did, by virtue of the power and authority conferred upon them by the legislative provision of the Defence of the Realm Regulation in force on May 1, 1916.

It is, I think, equally clear that the respondents never admitted that the Crown possessed, under these Regulations, the power it claimed to exercise. This is apparent from Mr. Whinney's letters of May 3 and 5, 1916.

In only three ways, it would appear to me, could the respondents resist or oppose the action of the Crown : (1.) By physical force—which is, of course, impossible ; (2.) By immediate proceedings at law ; and (3.) by protest. They adopted the last named of these methods, but, subject to that, yielded only to force majeure. Mr. Whinney no doubt informed Captain Coles that, notwithstanding what he had said, all those interested in the hotel felt that every assistance should be given to the military authorities, and that no steps should be taken which would cause inconvenience or delay, and, further, that he had caused notice to be given to all the guests in the hotel, and would hand over possession in accordance with the notice (i.e., the letter of May 1, 1916). Possession

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
Lord Dunedin.

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE

KEYSER'S

ROYAL

HOTEL.

—
Lord Atkinson.

was handed over accordingly on May 8. It appears to me impossible, on these facts, to hold that this handing over by the respondents of the possession of their hotel was not in reality done in invitum.

The respondents having done this, and expressly preserved all their legal rights, they, like good citizens, without prejudice to those rights, facilitated these officers in taking over the possession in order to help the Aerial Service to be better carried on. If anything resembling what has taken place in this case had taken place between two citizens, it is obvious that the most appropriate remedy of the party aggrieved would have been to sue in trespass for damages. The respondents cannot proceed by Petition of Right to get redress for a tort like trespass, for the King can do no wrong, and the principle of respondeat superior does not apply to the Crown where a wrong is committed by its officers. It by no means follows, however, that because the respondents cannot sue in tort by petition of right they can sue in contract for compensation for the use and occupation of their premises.

It is no doubt quite true that a private person, or in some instances a public body, can, as it is phrased, waive a tort and sue in contract, but that can only be true where both of these remedies are open to him or it. The aggrieved party may then elect which remedy to pursue, and this, though both causes of action arise out of the same transaction. The case of a passenger in a railway train who takes and pays for a ticket to be carried to his destination and is injured in transitu by the negligence of the company's servants is a familiar instance of this. He can sue the company in either form of action. That, however, of course does not apply to a case where a trespasser enters into and holds possession of a man's land against his will, while purporting to act under a power the existence of which the owner challenges, and against the exercise of which he protests.

The Court of Appeal, as I understand their judgment, held that the Crown could be proceeded against by Petition of Right to recover compensation in use and occupation for the breach of its contract to pay for the use and enjoyment of

the respondents' hotel. And several authorities had been cited to support this view. H. L. (E.)

Differing—as I do—on this point, from the views of the two learned Lord Justices who constituted the majority, and entertaining—as I do—the most sincere respect for the survivor of those two Lord Justices, as well as for the memory of the distinguished Lord Justice since unhappily deceased, I feel bound to justify my dissent from their views by an examination of the authorities on the point, at greater length, perhaps, than might otherwise be excusable. These authorities establish, I think, this proposition, that, in order to recover in the ordinary action for use and occupation, the plaintiff must prove the existence of an agreement, express or implied, between him and the defendant, to the effect that the latter shall at least be the tenant at will of the former of the lands or premises occupied, and shall pay for that occupation. In *Phillips v. Homfray* (1) Bowen L.J., as he then was, said :—

1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Atkinson.

“ Actions for use and occupation, according to the better opinion, have been confined to the class of cases where defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract : see *Churchward v. Ford* (2), per Pollock C.B. ; *Birch v. Wright*. (3) No doubt the mere enjoyment by one man of another man's property, real or personal, may be had under such circumstances as leave still open, as a reasonable inference, the presumption that it is taken on the terms of payment, just as a man who takes a bun from the refreshment counter at a railway station, takes it on the implied promise to pay for it.”

A familiar example of the class of cases in which the circumstances negative the implication of such a contract is where a purchaser enters with the owner's permission into possession of property sold under a contract of sale, the purchase of which subsequently goes off. In *Howard v. Shaw* (4) Parke B. said :—

“ If the defendant had entered under an agreement for a

(1) 24 Ch. D. 439, 461.

(3) (1786) 1 T. R. 378.

(2) 2 H. & N. 446.

(4) (1841) 8 M. & W. 118, 122.

H. L. (E.)
 1920
 ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 Lord Atkinson.

lease, there is no doubt he would have been a tenant at will until the lease was granted. Here it may be assumed that he entered into possession under the agreement for sale, which was to have been carried into effect by the conveyance. . . . I quite agree, however, that while the agreement subsisted, the defendant was not bound to pay a compensation for the occupation of the land, because the contract shews that he was to occupy without compensation . . . but still he was tenant at will. When the agreement went off, he still continued tenant at will; but after that, there was nothing to shew that he was not to pay a compensation for his occupation, because the stipulated compensation, by payment of the purchase money, was at an end. From that time, therefore, he became liable to be sued for such compensation, in an action for use and occupation."

Alderson B. gave judgment to the like effect, as also did Palles C.B. in *Markey v. Coote*. (1)

Even on the assumption that the Crown went into possession of the hotel, not by virtue of a legislative title, or by force of a paramount power, but by the permission of the respondents, which, for the reason already given, I think it impossible to hold, I am at a loss to see how an agreement binding at law to pay compensation for the occupation can be inferred, in face of the distinct refusal of Captain Coles in his letter of May 1, 1916, to pay any compensation whatever ex debito, but merely ex gratia.

In *Churchward v. Ford* (2) Pollock C.B. in delivering judgment said:—

"There are authorities to the effect that where nothing appears except that one person is entitled to land which another has occupied and enjoyed, an action for use and occupation may be maintained, because a contract may be implied. That explains the decision in *Hellier v. Sillcox*. (3) But the taking possession as of right by a disseisor could not be turned into a contract, on the notion that the trespass may be waived and some imaginary

(1) (1876) I. R. 10 C. L. 149.

(2) 2 H. & N. 446, 448.

(3) (1850) 19 L. J. (Q. B.) 295.

contract substituted. Here the defendant was in possession claiming title under Mrs. Foss with whom he in fact contracted. It cannot therefore be implied that there was a contract with the plaintiffs."

It would certainly appear to me that in this case the position of the Crown in reference to this matter resembles more closely that of the disseisor whom Pollock C.B. mentioned than it does that of a person entering with the permission of the owner of the premises. I now turn to the authorities relied upon by the Court of Appeal.

The first of these is the case of the *Marquis Camden v. Batterbury* (1), on appeal from the common pleas. There a certain builder named J. W. Elliott entered into agreement with the landlord of certain lands, the plaintiff in the action, to build certain houses on these lands, the plaintiff agreeing, as soon as one or more of these houses should be erected, to make a lease to Elliott for a term of years upon certain terms of each plot upon which a house was built. By the articles of agreement Elliott contracted that, until the land with the buildings upon it should be leased to him, he would pay the same yearly rents or sums as were to be received by the lease when granted. Elliott assigned his interest in this agreement to the defendant, who took possession of the lands, erected certain buildings upon them, paid the stipulated yearly sums, and then assigned his interest to one White. The action was brought for money claimed to be payable by the defendant (White) to the plaintiff in respect of the defendant's use by the plaintiff's permission of certain of the latter's lands and premises. It was held, affirming the judgment of the Court of Common Pleas, that neither Elliott nor the defendant acquired any interest in the land under the building agreement, nor was any tenancy from year to year created thereby, or by the occupation of the lands and the payment of the stipulated sums. With all respect, this case is, I think, an authority rather against the proposition it was cited to support than in favour of it. The next case is that of *Levi v. Lewis* (2), affirmed on appeal to the Exchequer

H. L. (E.)

1920

ATTORNEY-
GENERALv.
DE
KEYSER'S
ROYAL
HOTEL.

Lord Atkinson.

(1) (1860) 7 C. B. (N. S.) 864.

(2) (1859) 6 C. B. (N. S.) 766.

H. L. (E.) Chamber. (1) There Knight, the superior landlord, let the subject of the occupation to Levi the plaintiff for a term of years. Levi underlet to Lewis, the defendant, for the whole term, leaving no reversion to himself. The interest of both having expired together, Lewis applied to Knight to allow him to become his (Knight's) tenant. Knight refused, and referred to Levi as still his tenant. Lewis continued to occupy, and Knight, to the knowledge of Lewis, continued to insist on holding Levi liable. Levi then sued Lewis for use and occupation of the land since the expiration of the term, and Levi then paid the rent for that period to Knight, who accepted it. The trial Judge, Willes J., holding that there was no evidence to go to the jury of the use and occupation of the premises by Lewis as Levi's tenant, directed a non-suit. The Court of Common Pleas held that there was evidence to go to the jury on an implied contract by Lewis to pay Levi for the occupation of the premises. Willes J., in delivering judgment, said (2): "Conceding that the relative position of the parties would not alone have enabled Levi to bring the action, yet the conduct of the parties was such that we think there was evidence from which a jury might infer an understanding or implied contract between Levi and Lewis, that Lewis should pay for the occupation of the premises. . . . The jury might have thought that Lewis must have known that he was not considered as tenant to Knight, but that he was considered as tenant to Levi, and that Knight and Levi severally shew by their conduct that they each took the same view of the case," adding, however, that the Court gave no opinion as to the conclusion to which the jury ought to come. On appeal to the Exchequer Chamber, Wightman, Crompton, and Hill JJ. held that the decision of the Court of Common Pleas was right, and should be affirmed. Bramwell and Channell BB. thought it was wrong, and should be reversed, Bramwell B. adding that Martin B. when he left the Court was very much of his (Bramwell's) opinion. If Lewis immediately on the termination of the term had told Levi that he stoutly refused to admit that he was under any legal

(1) (1861) 9 C. B. (N. S.) 872.

(2) 6 C. B. (N. S.) 770.

1920
 ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 Lord Atkinson.

liability to pay compensation for his future occupation of the premises, there might possibly be some resemblance between this case and the present. As matters stand, there does not appear to me to be any resemblance whatever between them.

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.

The next case is that of *Hellier v. Sillcox*.⁽¹⁾ In reference to this case Bowen L.J. in *Phillips v. Homfray* (2) said :—

Lord Atkinson.

“There have been, no doubt, instances in which, nothing further appearing in evidence but that one person is the owner of land and that another person had taken possession of and enjoyed it, an action for use and occupation under the statute has been upheld: see *Hellier v. Sillcox*. (1) In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn, that the enjoyment was by permission of the rightful owner.”

Then follow the passages as to the more correct view already cited. The two facts: (1.) that the Crown, in my view, did not enter into possession with the free leave and consent of the respondents but by the coercion of a superior power; and (2.) that the Crown, when it did, through its officers, enter into possession absolutely refused to acknowledge any legal liability to pay compensation in respect of the use and enjoyment of the hotel, fundamentally distinguish all these cases from the present case.

In my opinion, therefore, a Petition of Right not based upon the statutes of 1798, 1842 or 1914, or the Regulations made under them, but merely on such legal liability as arises between citizens when one occupies and enjoys the property of another, with the express or implied permission of that other to pay compensation for that enjoyment, would, on the facts of this case, fail. It is an entirely different question whether on those same facts these statutes and Regulations do not impose upon the Crown a statutory liability to pay reasonable compensation, in the form of a rent or otherwise, for the possession, occupation, use, and enjoyment, acquired compulsorily, of the respondent's hotel.

The late Master of the Rolls in the following pregnant

(1) 19 L. J. (Q. B.) 295.

(2) 24 Ch. D. 439, 461.

H. L. (E.) passage of his judgment put a rather unanswerable question.
 1920 He said :—

ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 —
 Lord Atkinson.

“Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative ? ”

It was not contended, it could not, I think, be successfully contended, that the Act of 1842 and the Defence of the Realm Consolidation Act of 1914 (hereinafter referred to as the Act of 1914) do not bind the Crown, seeing that they deal with what is the special trust and duty of the King to provide for—namely, the defence and security of the realm—and prescribe the mode in which, and the methods by which, land or its use is to be acquired by the Crown's officers, the Ordnance Department, the Admiralty, the Army Council, the members of His Majesty's forces, and other persons acting on his behalf, for these very purposes. Whether one applies the test suggested in Bacon's Abridgement, 7th ed., vol. vii., 462, quoted, apparently, with approval by Jessel M.R. in *Ex parte Postmaster-General* (1) or that laid down by Lord Lindley in *Wheaton v. Maple* (2), that the Crown is never bound by a statutory enactment unless the intention of the Legislature to bind the Crown is clear and unmistakable, I think these statutes and Regulations satisfy both those tests. Before dealing with them I desire to express my complete concurrence in the conclusion at which the late Master of the Rolls arrived as to the result of the searches made by the Crown touching the nature and particulars of the commissions issued in early times, in order to determine what sums were paid *ex gratia* where lands were taken by the Crown or its officers for the defence of the realm, and the occupation of them connected

(1) (1879) 10 Ch. D. 595, 601.

(2) [1893] 3 Ch. 48, 64.

therewith by the military. The conclusion, as I understand it, is this: that it does not appear that the Crown has ever taken for these purposes the land of the subject without paying for it, and that there is no trace of the Crown having, even in the times of the Stuarts, exercised or asserted the power or right to do so by virtue of the Royal Prerogative. I also concur with the conclusion at which that distinguished and learned judge arrived as to the purpose, object, and effect of the body of legislation passed from the year 1708 to the year 1798, enabling land, or the use of it, to be compulsorily acquired by the Crown on the terms of the owner being paid for it.

I further concur with him in his analysis of the provisions of the Acts passed in 1803, 1804, 1819, dealing with the public service. I agree that in all this legislation there is not a trace of a suggestion that the Crown was left free to ignore these statutory provisions, and by its unfettered prerogative do the very things the statutes empowered the Crown to do, but free from the conditions and restrictions imposed by the statutes.

It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions,

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

Lord Atkinson.

H. L. (E.) and that its prerogative power to do that thing is in abeyance.
 1920 Whichever mode of expression be used, the result intended
 ATTORNEY- to be indicated is, I think, the same—namely, that after the
 GENERAL statute has been passed, and while it is in force, the thing it
 v. empowers the Crown to do can thenceforth only be done
 DE by and under the statute, and subject to all the limita-
 KEYSER'S tions, restrictions and conditions by it imposed, however
 ROYAL the Royal Prerogative may theretofore have
 HOTEL. been.
 Lord Atkinson.

If that be so, as I think it is, then the first question to be determined is what particular things the Defence Act of 1842, which is really the culmination of the legislation passed from 1800 downwards, enacts: what the Defence of the Realm Consolidation Act of 1914, coupled with the Regulations issued under it, empowers the Crown to do, and what are the conditions, if any, imposed upon the doing of it.

By s. 2, sub-s. 2, of the Defence of the Realm Consolidation Act, 1914 (6 Geo. 5, c. 8), passed on November 27, 1914, the two previous statutes (4 & 5 Geo. 5, c. 29, and 4 & 5 Geo. 5, c. 63) are repealed, but it is provided that nothing in that repeal shall affect any orders made thereunder, and that all such Orders in Council shall, until altered or revoked by an Order in Council under this Act (i.e., 5 Geo. 5, c. 8), continue in force and have effect as if made under the latter Act.

By s. 1, sub-s. 1, it is provided that during the continuance of the then present war His Majesty may issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and the members of His Majesty's forces and other persons acting on his behalf, and may by such regulations authorize the trial by court-martial, or, in cases of minor offences, by Courts of Summary Jurisdiction, and punishment of persons committing offences against the Regulations, and in particular against any of the provisions and Regulations designed for the five particular purposes there mentioned. The Regulations must be designed to secure the public safety and defence of the realm. Sub-s. 2

provides that any such Regulations—that is, any Regulations issued to effect those two objects—may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making by-laws, or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903. There is no independent express provision in this Act of 1914 enabling the Crown, in the emergency of the war, to acquire land or the use of it for the purpose of securing the public safety and the defence of the realm. It must, therefore, I think, be assumed that, by reason of the provisions of this second sub-section, it was designed and intended by the Legislature that the ample powers for the acquisition of land or the use of it, either by agreement of purchase or compulsorily, conferred upon the Crown by the Act of 1842, should be availed of. Whether the land or its use were presumed to be acquired by voluntary purchase under its sixteenth section, or compulsorily under its nineteenth section, the owner in each case was to be paid or compensated for what he parted with.

In addition, by its twenty-third section, a further restriction was placed upon the exercise of the power of compulsory purchase. That section enacted that no lands or building or other hereditament should be taken without the consent of the owner unless the necessity or expediency of taking it should be certified by the Lord-Lieutenant of the county in which the land or hereditament lay, or in the alternative, by one or more of the other public functionaries named, and unless the taking of the land or building or other hereditament should be authorized by a warrant signed by the Lord High Treasurer or one or more of the Commissioners of the Treasury of the United Kingdom for the time being.

The methods of modern warfare have so vastly changed since this Act of 1842 was passed, that, if it was availed of, as it stood, by the Crown in the course of the late war, the restrictions might seriously delay and embarrass the Crown in taking, through its officers, adequate measures to secure the public safety and the defence of the realm, while if the restrictions were removed its amended machinery might be

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE

KEYSER'S
ROYAL
HOTEL.

Lord Atkinson.

H. L. (E.) 1920
 ATTORNEY-GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 Lord Atkinson.

adequate for the occasion. It is apparently with this view that sub-s. 2 of the Act of 1914 is confined to the removal of those restrictions. There is no attempt to set up new machinery. The powers conferred by the Act of 1842, thus unfettered, are to be allowed to remain operative and available for use. The words of sub-s. 2, moreover, are "restrictions on the acquisition or user of land." When those restrictions are examined it is, in my mind, clear that the legal obligation to pay for the land or its use, temporarily or permanently acquired, is not a restriction upon the acquisition of either, or a condition precedent to its acquisition. There is nothing in the statute to suggest that the liability to pay is to be affected or taken away by the Regulations which may be issued, and if the Regulations purported to do that I doubt if they would not, having regard to the wording of sub-s. 2, be *ultra vires*. Neither the public safety nor the defence of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects. The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation. Bowen L.J. in *London and North Western Ry. Co. v. Evans* (1) said: "The Legislature cannot fairly be supposed to intend, in the absence of clear words shewing such intention, that one man's property shall be confiscated for the benefit of others, or of the public, without any compensation being provided for him in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle . . . if it sees fit to do so, but, it is not likely that it will be found disregarding it, without plain expressions of such a purpose." There is not in the Act of 1914 or in the Regulation framed under it any indication of such a confiscatory purpose.

The Regulations 2, 2A, do not expressly suspend any restrictions on the acquisition of or user of land imposed by the Defence Act of 1842. The Regulations commence with

(1) [1893] 1 Ch. 16, 28.

the statement that the enjoyment of property will be interfered with as little as may be permitted by the exigencies of the measures required to be taken for securing the public safety and the defence of the realm ; and provide that the Admiralty, Army Council and Air Council and Members of the Naval and Military Forces, and the other persons executing the Regulations shall, in carrying them into effect, observe these general principles. Thus by Regulation 2 it is further provided that the Naval and Military Authority (defined in Regulation 62), or any person duly authorized by him, may, when necessary for the purpose expressly indicated—namely, for securing the public safety and defence of the realm—do several things involving the taking possession of land and user of the real property of the subject without any of the preliminaries prescribed by the Defence Act of 1842 ; for instance, he may take possession of any land, construct military roads thereon, remove any trees, hedges or fences therefrom ; take possession of any buildings or other property, including works for the supply of gas, electricity or water, or any sources of water supply ; take such steps as may be necessary for placing any buildings or structures in a state of defence ; cause any buildings to be destroyed, and finally do any other act involving interference with private rights of property for the aforesaid purposes. As to real property, no preliminary procedure of any kind is prescribed, and no mention whatever is made as to payment or compensation in respect of it. As regards personal property, however, it is provided by the last clause of Regulation 2A that if, after the competent naval authority has issued notice that he has taken or intends to take possession of any movable property in pursuance of that Regulation, any person, having control of any such property, sells, removes or secretes it without the consent of the competent military authority, he shall be guilty of an offence against the Regulations. Presumably some such notice should be given in the case of real property, though that is not expressly provided. Then one finds a most significant provision in Regulation 2B—namely, that where any goods, the possession of which has been so taken, are required

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

Lord Atkinson.

H. L. (E.) by the Admiralty, Army Council or Air Council or the Minister of Munitions, the price to be paid for them is to be determined in the manner therein provided. These Regulations on their very face justify an immediate taking possession of the real property of the subject without any preliminary formality or procedure. They are in absolute conflict with the provisions of the Defence Act of 1842 imposing restrictions on the acquisition of land or its use, and prescribing formalities. The two cannot be reconciled, and the irresistible conclusion must, therefore, be that the earlier provisions have been suspended by the later.

1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Atkinson.

Again it appears to me to be almost inconceivable that the Crown should claim the right to do such things as prostrate fences, take possession of the great industrial works mentioned, or cause any buildings to be destroyed, without being bound at law to compensate the owners therefor. The fact that no provision to a contrary effect has been introduced into these Regulations in reference to real property, while one is introduced touching goods acquired, suggests, I think, that the provisions of the Defence Act of 1842 touching payment or compensation for real property taken or used were left to apply. There is nothing in these Regulations inconsistent with their being so left. Much reliance was placed by the Crown on the Defence of the Realm (Acquisition of Land) Act, 1916 (6 & 7 Geo. 5, c. 63). First, because in its first section it recognizes that possession of land may be taken by a Government department for the purposes connected with the war, in exercise of a prerogative right of His Majesty, as well as under any statute relating to the defence of the realm, or by agreement, or otherwise; and it enables this department to continue in possession of the land for any period not exceeding two years after the termination of the war. And, second, because by the same section it provides that the department which continues to occupy the lands after the termination of the war shall pay a rent in respect of this continued occupation. As the Regulations to be issued under the Defence of the Realm Consolidation Act, 1914, can only be issued and be operative during the war, of course they could not deal with possession of land after

the war had ended, and therefore further possession had to be provided for ; but it is difficult to see upon what just or rational principle the owner of land should be paid a rent for his land in respect of the possession of it, while held by a department after the war has terminated (obviously for the purposes of winding up the business of the Department), and not paid a rent or compensation for its use and possession by a department of the State while the war continued. This last provision it would appear to me hinders rather than helps the contention of the Crown. I should be sorry to attempt to lay down any rule of general application by which the limits of the Royal Prerogative might be determined. That is not necessary, in my view, in this case. In my opinion in this case a statutory liability is imposed upon the Crown to pay for the use and occupation of the respondent's property. I base that opinion upon the facts of the case and the provisions of the legislation upon which the officers of the Crown justified their action. The Attorney-General in his able argument relied much on the word "temporary"—"temporary use," "temporary occupation." What does the word "temporary" mean in such a connection ? It might cover years, yet mean only the duration of the war. In this case it covered over three years. At the beginning or early stages of a war its duration never could be prophetically fixed, even approximately. It has already been decided in your Lordships' House in several instances that contracts whose performance is interrupted by war are terminated because the duration of the interruption cannot be, even approximately, foretold ; so that the word "temporary" would in the result mean in most cases of this kind the duration of the war, which might be years.

The only remaining point is whether a Petition of Right will lie in respect of the statutory liability for an unliquidated amount, not a fixed sum. In my opinion, based on the authority of *Reg. v. Doutre* (1) and *Windsor, &c., Ry. Co. v. Reg.* (2), there is no valid distinction between a sum due under a contract or grant made by or on behalf of the Crown as

H. L. (E.)

1920

ATTORNEY-

GENERAL

v.

DE

KEYSER'S

ROYAL

HOTEL.

Lord Atkinson.

(1) (1884) 9 App. Cas. 745. (2) 11 App. Cas. 607.

H. L. (E.) mentioned by Erle C.J. in *Tobin v. Reg.* (1), and such
 1920 a liability, due for the lawful and authorized use and
 ATTORNEY- enjoyment by the officer of the Sovereign, on the Sovereign's
 GENERAL behalf, of the lands or buildings of a subject. Both seem
 v. equally untainted by tort, both equally untouched by the
 DE principle that the King can do no wrong.
 KEYSER'S
 ROYAL
 HOTEL.

Lord Atkinson.

I therefore think that the appeal fails, that the judgment of the Court of Appeal was right and should be affirmed, and this appeal be dismissed with costs.

LORD MOULTON. My Lords, the present appeal is in the matter of Petition of Right presented by De Keyser's Royal Hotel, Ltd., the owners of the well-known hotel of that name, for compensation for the compulsory occupation of certain parts of their premises by the War Office acting in the name and on behalf of the Crown for purposes connected with the defence of the realm during the late war. The Crown contests the right of the suppliants to compensation for such compulsory occupation, and pleads that it was an exercise of the Royal Prerogative, and gave no right of compensation.

The facts of the case are not substantially in dispute, the real issue being a question of law of great and general importance. I shall therefore deal very shortly with the evidence as to what actually took place at the time when occupation of the premises was taken by the Crown.

In April, 1916, the authorities at the War Office came to the conclusion that the premises in question were the most suitable for housing the heads of the department having charge of the Army Air Service, and accordingly they, by a letter dated April 18, 1916, instructed the Office of Works to make immediate arrangements to acquire them for that purpose. Negotiations were thereupon commenced between the Office of Works and Mr. Whinney (who then represented the suppliants' interests) for such acquisition. It was at first proposed that they should be acquired voluntarily at an agreed rent, but as the parties differed as to the amount of this rent the Board of Works abandoned the negotiations,

and informed Mr. Whinney that they were about to "communicate with the War Office with a view to the total premises (excluding the shops) being requisitioned under the Defence of the Realm Acts in the usual manner."

The War Office agreed to this course being taken, and on May 1 the Office of Works, by their direction, wrote to Mr. Whinney a letter, the material parts of which are as follows:—

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

Lord Moulton.

"DE KEYSER'S ROYAL HOTEL, E.C.

"Dear Sir,

"I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations (excluding the shops, the other portions sub-let, and the wine cellars). . . . We do not propose to take possession until the 8th inst., but I shall be glad if you will accept this as formal notice of the Department's intention to take possession on that day."

In accordance with this notice a representative of the War Office attended on the 8th inst., and took possession of the premises, which were forthwith occupied by the military authorities, and continued to be so occupied throughout the period of the war. It is in respect of this occupation that the suppliants claim compensation.

The representatives of the Crown have throughout insisted that possession was taken of the premises under the Royal Prerogative, and that therefore the suppliants were not entitled as of right to any payment by way of compensation, but that their sole remedy was to apply to a certain Commission, named the Defence of the Realm Losses Commission, for an ex gratia allowance in respect of the losses that they would suffer by the occupation of their premises on behalf of the Crown. This Commission was appointed by Royal Order on March 31, 1915, "to inquire and determine and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid to applicants . . . in respect of direct and substantial loss and damage sustained by them by reason of interference with their property or business in the United Kingdom through

H. L. (E.) 1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Moulton.

the exercise by the Crown of its rights and duties in the Defence of the Realm." It is evident that the existence of the powers of this Commission can have no bearing upon the question raised by this Petition of Right. Its jurisdiction is restricted to "cases not otherwise provided for," and the whole basis of this Petition of Right is that the case is already provided for. The suppliants claim that they have a legal right to the compensation, and it is that right which they are seeking to enforce by this petition.

In the petition the suppliants put forward an alternative ground for their claim—namely, that the premises were given up to the Government by them voluntarily under circumstances which would in law imply a contract on the part of the Crown to pay for use and occupation of the premises. Without discussing the conditions under which such a contract may be implied, it suffices to say that in my opinion it is abundantly clear that the premises were not surrendered voluntarily but were taken compulsorily. Both parties in their letters written at the time treat it as a case of commandeering, as it in fact was, and Mr. Whinney protested strongly against the action of the Government in the matter. In short, he did everything to prevent their taking the premises short of refusing to give them up unless the Government used physical force to obtain an entry. Had he gone further in his resistance than he actually did he would clearly have put himself in the wrong, for whatever be the suppliants' right as to compensation, the Government were undoubtedly entitled to commandeer the premises if they needed them for the purposes of the defence of the realm.

In deciding the issues raised herein between the Crown and the suppliants, the first question to be settled in the present case might be, to my mind, treated as a question of fact—namely, Was possession in fact taken under the Royal Prerogative or under special statutory powers giving to the Crown the requisite authority? Regarded as a question of fact, this is a matter which does not admit of doubt. Possession was expressly taken under statutory powers. The letter of May 1, 1916, from the representative of the Army

Council to Mr. Whinney says: "I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations." It was in response to this demand that possession was given. It is not competent to the Crown, who took and retained such possession, to deny that their representative was acting under the powers given to it by these Regulations, the validity of which rests entirely on statute.

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Moulton.

It was not a matter of slight importance whether the demand for possession purported to be made under the statutory powers of the Crown or the Royal Prerogative. Even the most fervent believer in the scope of the Royal Prerogative must admit that the powers of the Crown were extended by the Defence of the Realm Consolidation Act and the Regulations made thereunder. It was for that purpose that the Act was passed and the Regulations made. But even if that were not so there was a manifest advantage in proceeding under the statutory powers. It rendered it impossible for the subject to contest the right of the Crown to take the premises by the exercise of the powers given by the statute. The statutory powers of the Crown were formulated in the Regulations in a manner which was beyond mistake. For example, the Regulations gave to the Crown the power "to take possession of any buildings." Mr. Whinney therefore was clearly bound to surrender the premises when demanded. It would have been a very different matter had the demand been made under the Royal Prerogative. This litigation itself is enough to show how debatable a proposition it would have been if the claim had been made that the ancient prerogative of the Crown covered the taking of a hotel in London for the more comfortable housing of a military staff and its clerks and typewriters. All such questions were put at rest by the Legislature giving express statutory authority by the Regulations. There could henceforward be no doubt that the Crown possessed the powers formulated in the Regulations, and this was the object of the legislation. But when the Crown elects to act under the authority of a statute, it, like any other person, must take the powers that

H. L. (E.) 1920 it thus uses *cum onere*. It cannot take the powers without fulfilling the condition that the statute imposes on the use of such powers.

ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Moulton.
—

The Defence of the Realm Consolidation Act, 1914, commenced by enacting that "His Majesty in Council has power to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the Members of His Majesty's forces and other persons acting on his behalf." It then goes on to particularize certain subjects to which these Regulations may relate, and in sub-s. 2 it deals with the question of the acquisition of land as follows :—

"Any such regulations may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of the power of making bye-laws, or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903."

The Defence Act, 1842 (which may be taken to represent the whole of the Defence Acts inasmuch as the later Acts only modify it in details which do not concern the matter in this case), is the last of a series of Acts regulating the acquisition of lands and interests in land for purposes of the defence of the realm. These Acts commence in 1708, and occur at intervals up to 1842. At first they related only to land for fortifications at places mentioned in the Act, but later they became more general in their character, and authorized the Crown to select suitable land and acquire it. In all cases compensation was given to the owners for the land taken. But it is not necessary to dwell on their provisions, seeing that the Defence Act, 1842, repealed all such existing Acts and laid down general provisions which have regulated since that time the procedure for the acquisition by the Crown of land for such purposes.

This Act gives very wide powers to the Crown. It has unrestricted powers of selection of the necessary lands, buildings, etc., to be taken. It contemplates in the first instance voluntary purchase, but, if that cannot be arranged, then the lands, etc., may be acquired compulsorily subject to certain

certificates being obtained as to the necessity or expediency of the acquisition or in case of actual invasion. I am satisfied that it enables the Crown to acquire either the property or the possession or use of it as it may need. In all cases compensation is to be paid by the Crown, the amount to be settled by a jury.

The Regulations and the Act under which they are made must, of course, be read together, and it is in my opinion a sound inference from the language of sub-s. 2 that the Legislature intended that, so far as the acquisition or user of land was concerned, the Regulations should take the form of action under the Defence Act, 1842, facilitated by the suspension of some or all of the restrictions which it imposes. The particular provisions relating to the taking of land or buildings are to be found in s. 2 of the Regulations. They empower the military authorities to take possession of any land or of any buildings where for the purposes of the defence of the realm it is necessary so to do. These are very wide powers, but so general are the powers of the Defence Act, 1842, that they would be attained by simply suspending the restrictions therein contained and allowing its powers to be put in force without them. Reading therefore this Regulation with sub-s. 2 of the Act, I think it is clear that in the case of acquisition and user of land under the Regulations we ought to consider them as authorizing action being taken under the Defence Act, 1842, save that no restrictions therein appearing are to be enforced. The duty of paying compensation cannot be regarded as a restriction. It is a consequence of the taking, but in no way restricts it, and, therefore, as the acquisition is made under the Defence Act, 1842, the suppliants are entitled to the compensation provided by that Act.

On these grounds therefore I am of opinion that the suppliants are entitled to our judgment in this appeal. But it would be unsatisfactory in a case of such general importance to leave unconsidered the question whether, apart from the fact that the Crown expressly purported to be acting under powers given to it by statute, the suppliants' claim could be maintained.

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

Lord Moulton.

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

Lord Moulton.

To decide this question one must consider the nature and extent of the so-called Royal Prerogative in the matter of taking or occupying land for the better defence of the realm. I have no doubt that in early days, when war was carried on in a simpler fashion and on a smaller scale than is the case in modern times, the Crown, to whom the defence of the realm was entrusted, had wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when the necessity arose. But such necessity would be in general an actual and immediate necessity arising in face of the enemy and in circumstances where the rule *Salus populi suprema lex* was clearly applicable. The necessity would in almost all cases be local, and no one could deny the right of the Crown to raise fortifications on or otherwise occupy the land of the subject in the face of the enemy, if it were necessary so to do.

Nor have I any doubt that in those days the subjects who had suffered in this way in war would not have been held to have any claim against the Crown for compensation in respect of the damage they had thus suffered. It must not be forgotten that in those days the costs of war were mainly borne by the Royal Revenues, so that the King himself was the heaviest sufferer. The limited and necessary interference with the property of the subjects, of which I have spoken, would have been looked upon as part of the damage done by the war which it had fallen to their lot to bear, and there is no reason to think that anyone would have thought that he had a claim against the Crown in respect of it. Certainly no trace of any such claim having been put forward is to be found.

This state of things lasted for several centuries. The records of the preparations made by Queen Elizabeth to resist the attack of the Spanish Armada, which are contained in the papers in this case, show that it was in full force in her time. I am not surprised that the careful (though necessarily incomplete) researches into the Public Records have found no precedent for the claim as of right against the Crown, for acts done under its prerogative in occupying or using land under the stress of such a necessity as I have spoken of, and I do

not think that a complete investigation would have met with greater success. H. L. (E.)

1920

But in the last three centuries very important changes have occurred, which have completely altered the position of the Crown in such matters. In the first place, war has become far more complicated, and necessitates costly and elaborate preparations in the form of permanent fortifications, and otherwise, which must be made in times of peace. In the second place, the cost of war has become too great to be borne by the Royal Revenues, so that the money for it has to come from the people through the Legislature, which long ago assumed, and has since retained, the command of all national resources. In the third place, the feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment. The effect of these changes is seen in the long series of statutes relating to the occupation of land for the purposes of fortifications or otherwise for national defence, to which I have already referred and which cover the last two centuries. In all these Acts provision was made for compensation to the individual whose lands were taken or used, and indeed there is clear evidence that for many years, prior to the first of these statutes, the Crown acted on this principle. It is not necessary to examine these Acts in detail. They were mostly local in their operation and frequently temporary, and usually related to specific fortifications which it was proposed to erect.

ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.

Lord Moulton.

But towards the beginning of the last century the Acts take on a more general and permanent form, and eventually they culminate in the Defence Act, 1842, which gives to the Crown, through its properly appointed officials, the widest possible powers of taking land and buildings needed for the defence of the realm under a minutely defined procedure set out in the Act. It contemplates as I have already said that the acquisition shall, as a rule, be by agreement, but it gives ample powers of compulsory acquisition if the necessity be duly vouched, or in case of an actual invasion. In all cases compensation for the taking or using of the land by the Crown is to be

H. L. (E.) 1920
 ATTORNEY-GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 Lord Moulton.

assessed by a jury who (in the words of the Act) have to find
 “the compensation to be paid, either for the absolute purchase
 of such lands, buildings, or other hereditaments, or for the
 possession or use thereof, as the case may be.”

This Act was not limited either in time or place, and with
 small modifications, which are not material for our present
 purpose, is still in force.

What effect has this course of legislation upon the Royal
 Prerogative? I do not think that it can be said to have
 abrogated that prerogative in any way, but it has given to the
 Crown statutory powers which render the exercise of that
 prerogative unnecessary, because the statutory powers that
 have been conferred upon it are wider and more comprehensive
 than those of the prerogative itself. But it has done more than
 this. It has indicated unmistakably that it is the intention
 of the nation that the powers of the Crown in these respects
 should be exercised in the equitable manner set forth in the
 statute, so that the burden shall not fall on the individual,
 but shall be borne by the community.

This being so, when powers covered by this statute are
 exercised by the Crown it must be presumed that they are so
 exercised under the statute, and therefore subject to the
 equitable provision for compensation which is to be found in
 it. There can be no excuse for reverting to prerogative
 powers simpliciter—if indeed they ever did exist in such a
 form as would cover the proposed acquisition, a matter which
 is far from clear in such a case as the present—when the
 Legislature has given to the Crown statutory powers which
 are wider even than anyone pretends that it possessed under
 the prerogative, and which cover all that can be necessary
 for the defence of the nation, and which are moreover
 accompanied by safeguards to the individual which are in
 agreement with the demands of justice. Accordingly, if the
 commandeering of the buildings in this case had not been
 expressly done under statutory powers, I should have held
 that the Crown must be presumed to have acted under these
 statutory powers, and thus given to the subject the statutory
 right to compensation.

In the argument for the Crown reference was made to the Defence of the Realm (Acquisition of Land) Act, 1916. This Act was passed subsequently to the taking of the suppliants' lands, and therefore has no bearing on the question before this House. There is nothing in it which purports to take away any right already acquired by the suppliants, and, if it modifies in any way the quantum of the compensation, that is a matter for the tribunal which will have to assess it, and is not relevant to the present appeal. I am therefore of opinion that the suppliants are entitled to the declaration in the form approved of by the Court below, and that this appeal should be dismissed with costs.

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Moulton.
—

LORD SUMNER. My Lords, the petition alleges in substance two rights to compensation, one for a rent for the use and occupation of this hotel, of which the Crown took possession with Mr. Whinney's permission, the other for a fair rent as compensation because he voluntarily delivered possession, though protesting against the rights then alleged and maintaining his own claims of right, whatever they might be.

The answer and plea, beside traverses, allege an exercise of the Royal Prerogative for the defence of the realm and also rely on the Defence of the Realm Consolidation Act, 1914, and the Regulations issued thereunder. Mention is made of an offer to pay whatever the Defence of the Realm Losses Commission might award, but I think this topic has no relevance. The payment would have been none the less an *ex gratia* payment, though the sum to be paid had been calculated under the forms of a judicial proceeding. Its acceptance would have involved a waiver of the suppliants' alleged right; its refusal cannot be an answer to that right, if they can establish it.

Another introductory argument may be mentioned to be put aside. The appellant, as I understand it, contends that what was done was done under the prerogative and not otherwise. If the prerogative was exceeded then every servant of the Crown who used the premises would be personally guilty of trespass, and trespass being the suppliants' real

H. L. (E.) 1920
 ATTORNEY-GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 Lord Sumner.

remedy, the Crown succeeds. It is the typists and the clerks who are liable. If, on the other hand, the prerogative was not exceeded, the Crown succeeds again. The singularity of this result certainly invited criticism, and I was at first inclined to think that there might be an answer analogous to the rule of waiving a tort and suing on an implied assumpsit. When a civil right may be vindicated in more ways than one, there is a choice of remedies: *Rodgers v. Maw* (1); nor does it necessarily follow that this choice only arises between such remedies as are available against one and the same party. If the servant of a company, acting ultra vires the company, converts a stranger's chattel, and, having sold it, pays the proceeds into the company's account as its servant, I suppose an action for conversion would lie against the servant and for money had and received against the company: cf. *Smith v. Hodson*. (2) I have, however, come to the conclusion that no real advantage will be gained by pursuing arguments turning on forms of actions, for this reason. The suppliants must make out their right, and when they allege a right under the Defence Acts they negative any wrong done in the name of the Crown. There was no trespass by the clerks and the typists. They acted on a possession lawfully taken by the Crown, but a possession taken upon terms, and those terms were such as gave the suppliants a right to compensation. The only question is whether there is a statutory right against the Crown under the Defence Acts.

In terms the Crown purported to requisition under the Defence of the Realm Acts, and, on the correspondence, I think that there was no such request by the Crown for leave to occupy, followed by consent on the part of the respondents, as would support a claim to a quantum meruit compensation or rent apart from the statutes. There was nevertheless such assent as prevents the occupation from having been taken wholly in invitio, so as to leave the respondents no position but that of the sufferer of a wrong. Obviously Mr. Whinney's duty and interest alike impelled him to insistence on compensation, not to resistance to taking possession. It was money,

(1) (1846) 15 M. & W. 444, 448.

(2) (1791) 4 T. R. 211.

not the hotel, that he wanted, and it does not matter whether he knew or not on what legal ground to put his claim. The question does not really turn on permission or submission. On the facts he cannot say that he so gave possession as to imply a contract for rent, but I see nothing in them to exclude his assertion of a right to compensation, if he can establish that right in law.

The Crown has throughout purported to act on statutory rights (whether fully or correctly referred to or not), and the prerogative has not been vouched except in argument in the present case. I do not mean that it is not open to the Law Officers to rely on the prerogative now, or that I assume the writer of the letter dated April 29, 1916, to have had any authority to bind the Crown by an election between its statutory and its prerogative rights. If, however, under the statutes, including the Defence of the Realm Acts, which deal with taking buildings for the public safety and the defence of the realm, the Crown had the power to requisition this building on terms as to compensating the respondents, I think it cannot contend now, that by the course taken the exercise of statutory powers was excluded and that none were in fact exercised.

To begin with 1914, the question arises, whether the premises could have been acquired simply under the Defence of the Realm Consolidation Act, 1914 and the Regulations made thereunder, to the exclusion of the Defence Acts and so to the exclusion of any right to compensation, or whether, if statutory powers were exercised at all, they must have included the powers (and the obligations) for which these Acts provided. I think that no real importance attaches to the rearrangement of s. 1, which was made when the statute of November 27, 1914, superseded that of August 8. The Defence of the Realm Consolidation Act, 1914, does not purport to embody in the form of an enactment the Crown's existing prerogative. The Act empowers the Crown to issue Regulations. Now there is no prerogative to make Regulations, though it may be that some of the things, which may be regulated under the Act, might also be done under the prerogative. It is, however,

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

Lord Sumner.

H. L. (E.) also clear that some things, which may be validly ordered under Regulations under the Act, could not have been done under the pre-existing prerogative.

1920
 ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 Lord Sumner.

Further, under this Act alone no building could be requisitioned, unless and until some Regulation had been issued to that effect. Two kinds of Regulations might be issued, one for the purpose of securing the public safety and the defence of the realm, and the other in order to alter existing Acts of Parliament for the time being by providing for the suspension of any restrictions on the acquisition or user of land contained in sundry named Acts. Sect. 1, sub-s. 1, provides for the first kind; s. 1, sub-s. 2, for the second.

Of the Regulations No. 2 is that material to the present purpose; it deals with taking possession of any buildings and with doing any act (other than those specially described) involving interference with private rights of property. If the Crown were to exercise the powers of taking buildings, which are given by the Defence Acts, this Regulation could well be held to dispense with the formalities prescribed by them. They would be restrictions, which the Regulation would have suspended. The obligation to pay compensation to the dispossessed owner, which that Act provides for, is, however, not a restriction on the acquisition of his land. It might discourage the exercise of the power of acquisition, but it does not limit that power. The power is complete independently of payment, and it is fully exercised before the obligation to pay arises.

The next question is, should Regulation 2 be regarded as having been made in exercise of the powers given by the first or by the second sub-section of s. 1 of the Defence of the Realm Consolidation Act? In other words, is it to be regarded as an exercise of a power to requisition under Regulations issued for the purpose, or as an exercise of the power to facilitate requisitioning already authorized? It is true that it authorizes the competent naval or military authority to do the above-mentioned things "for the purpose of securing the public safety of the Defence of the Realm," but that is the purpose mentioned in s. 16 of the Defence Act, 1842, and the

words may only be a reference to that section. Furthermore, the Regulation deals with many matters beside the acquisition of land and buildings, and these would in any case require a substantive reference to the above purposes, which sufficiently accounts for the use of the words without its being necessary to read them as pointing to the exercise of a new power of requisitioning. With all respect to the opinion expressed by Avory J. (1) I think it should be treated as only an exercise of the power of suspending restrictions given by sub-s. 2.

If it were held that this Regulation is to be deemed to have been made, so far as the acquisition of land or buildings is concerned, in exercise of new powers given by sub-s. 1, on the ground that the Regulations to be issued are Regulations as to the powers of the Army Council from time to time and not merely as to the exercise of its powers, then it would follow that the Crown, having full power of accomplishing the desired acquisition under the Act of 1842, and of suspending any inconvenient restrictions on that power, must be deemed to have been advised to exercise a new power of accomplishing the same object, differing from the existing power in one respect only—namely, that it is accompanied by no obligation to pay the subject anything. I think it should not be assumed that, even if the Crown has such a power under s. 1, it has been advised to exercise it solely to avoid paying a subject for the exclusive use of his property. The presumptions must be, both that the executive action was taken under powers by which it can be justified, rather than beyond all powers whatever, and that the available powers have been exercised so as to prevent and not so as to cause avoidable injury to the subject.

Further, the Defence of the Realm Consolidation Act by sub-s. 2 of s. 1 gives an express and limited power of altering by Regulation what is enacted by the Defence Acts. I think that no further power of restricting those enactments is intended to be conferred by the general words of sub-s. 1, nor ought that sub-section, couched as it is in general terms only, to be construed as authorizing the Crown to do by Regulation what the Legislature itself has already fully provided for by

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Sumner.
—

(1) (1915) 84 L. J. K. B. 1961, 1963.

H. L. (E.) statute, least of all when that Regulation would have the effect of taking the subject's property without compensation contrary to the intention of the prior Acts.

1920
 ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 Lord Sumner.

The next question must be, is the Defence Act, 1842, with the other Defence Acts, adequate to enable the Crown to effect for the purpose of the defence of the realm such an object as that involved in the taking of this hotel? It is true that the Act enables much more to be done, and that the provisions for a greater or a less exercise of the power of taking lands are not kept separate. The same series of sections enables the Crown to take lands under the Act in peace or in war, in absolute ownership and in perpetuity or for temporary occupation only, but there is no difficulty in severing these provisions. It is true that, except for an express saving in s. 34, the Royal Prerogatives are not named, but the powers of taking land are such as only the Crown by its proper officers and departments can exercise, and the restrictions on the exercise of the statutory powers, which the Act requires, must necessarily be restrictions upon the powers of the Crown. It is true that some of these restrictions might in time of war be inconvenient in moments of extreme peril: of these the most formidable is the giving of a fourteen days' notice, though I observe that some overtures for this hotel were made in November, 1915, and when the officials came to business in 1916 eleven days were spent in negotiating for a rent, and the parties got as close together as 19,000*l.* and 17,500*l.*, before it was thought necessary to refer to the Defence of the Realm Act. If, however, formalities not inconsistent with the exigencies of a state of war in 1842 would have been prejudicial to the public service in 1916, the powers given by sub-s. 2 of s. 1 of the Act of 1914 had only to be exercised, as in fact they were, and all these difficulties would vanish. I see no reason to doubt that the Act of 1842 gave all the powers necessary for the exigencies of the recent war, subject only to the removal of restrictions contained in it, and there is therefore nothing to rebut the natural presumption that Regulation 2 is, in so far as it deals with matters to which the Defence Acts would apply, only an exercise of the power of removing existing statutory

restrictions, and is not new legislation by which the Crown takes new and unrestricted powers in order to obtain the same result.

The appellant further contended that all that was done could be done, and was done, independently of any statute, by virtue of the Royal Prerogative alone. I do not think that the precise extent of the prerogative need now be dealt with. The Legislature, by appropriate enactment, can deal with such a subject-matter as that now in question in such a way as to abate such portions of the prerogative as apply to it. It seems also to be obvious that enactments may have this effect, provided they directly deal with the subject-matter, even though they enact a *modus operandi* for securing the desired result, which is not the same as that of the prerogative. If a statute merely recorded existing inherent powers, nothing would be gained by the enactment, for nothing would be added to the existing law. There is no object in dealing by statute with the same subject-matter as is already dealt with by the prerogative, unless it be either to limit or at least to vary its exercise, or to provide an additional mode of attaining the same object. Even the restrictions (such as they were) imposed by the Defence Acts on any powers of requisitioning buildings in time of war were in no way inconsistent with an intention to abate the prerogative in this respect, if not absolutely, (see *New Windsor Corporation v. Taylor* (1)), at least for so long as the statute operates. In truth, the introduction of Regulations so reasonable only strengthens the substance of the Royal authority by removing all semblance of arbitrary power. When, however, the matter is looked at, as it now must be, in the light of Regulation 2, no room for doubt remains. The Regulation has the force of statute, and under its amelioration of the Defence Acts everything could be done for this purpose that could be done under the prerogative, equally efficiently and with equal speed. One difference, and one only, can be found. According to the argument, under the prerogative the subject could claim no compensation for losing the use of his property ;

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Sumner.

(1) [1899] A. C. 41, 49.

H. L. (E.) under the statute he could. Is it to be supposed that the
 1920 Legislature intended merely to give the Executive, as advisers
 ATTORNEY- of the Crown, the power of discriminating between subject
 GENERAL and subject, enriching one by electing to proceed under the
 v. statutē and impoverishing another when it requisitions under
 DE the alleged prerogative? To presume such an intention
 KEYSER'S seems to me contrary to the whole trend of our constitutional
 ROYAL history for over two hundred years.
 HOTEL.
 Lord Sumner.

Nor is it a reasonable interpretation to say that the object of the Defence Acts was merely to supplement the prerogative by enabling the Crown to pay compensation out of public funds to a subject damnified by the exercise of the prerogative, which otherwise it would not be able to do. A prerogative right to take without paying must have been a right to take without paying out of the Royal funds, but, in truth, prerogative can, at most, extend to taking, and stands quite apart from payment. There is no prerogative right to elect not to pay. Conversely, if there is adequate power to do all that is required by proceeding under the statute, where is the emergency and public necessity which is the foundation for resort to the prerogative?

My Lords, for these reasons I think that the Executive did not take possession under the prerogative, for the Defence Acts had superseded it; that the Act of 1914 and Regulation 2 did not in themselves enable possession to be taken; that the taking of possession must be referred to the powers given by the Defence Acts, and that, in consequence, the suppliants are entitled to be compensated in accordance therewith. I do not refer to the many statutes which preceded the Defence Act, 1842, from the time of Queen Anne, because they only seem to me to justify without altering my reasons for this conclusion.

This being so, there are only two further matters to which I wish to refer. They are the search which was made into the Public Records at the suggestion of the late Master of the Rolls, and the passages which have been cited from the opinion of the Judicial Committee in the case of *The Zamora*. (1)

(1) [1916] 2 A. C. 77.

That the search for documents relating to the taking of land for fortifications and similar purposes in times past was left incomplete and indeed was not much more than begun, is matter of considerable regret. So far as it went, it is said to have been inconclusive. Probably it will never go any further, for the result has scarcely been such as would encourage the Executive to proceed with it, and the subject does not greatly attract the student of history. The records cover both peace and war. The result, as it stands at present, seems to be this. Many documents are forthcoming which relate to the taking of land for such purposes by agreement and on payment of compensation. None can be found relating to taking land as of right and without any compensation at all, even in time of war. No petition of right is to be found in which a suppliant seeks to recover compensation, but whether this be, as the Crown suggests, because no subject ever had the temerity to put forward such a contention, or, as the respondents argue, because the Crown never gave him occasion to do so, is a matter which remains unknown. There appears to be no reported case which has decided that the subject is entitled to compensation for lands taken by the Crown, in purported exercise of the prerogative, but to this circumstance the same observation applies. The point that no suppliant has presented a Petition of Right with such an object seems to me to be in itself of minor importance. Experience in the present war must have taught us all that many things are done in the name of the Executive in such times purporting to be for the common good, which Englishmen have been too patriotic to contest. When the precedents of this war come to be relied on in wars to come, it must never be forgotten that much was voluntarily submitted to which might have been disputed, and that the absence of contest and even of protest is by no means always an admission of the right. In a lesser degree I see no reason why similar courses may not have been taken in times of less gravity. At any rate the fact remains that the claim of prerogative right maintained by the appellant is one, of the exercise of which history has preserved no record.

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

Lord Sumner.

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE
KEYSER'S
ROYAL
HOTEL.

Lord Sumner.

As to the judgment in *The Zamora* (1), I conceive what was there said to have been correct, but I think that it has been pressed beyond anything for which, truly understood, it is an authority. What has to be borne in mind is that no issue as to the Royal Prerogative arose for determination in that case. The question was, whether it was consistent with the Law of Nations that a Court of Prize should release to the Crown, against deposit of the value in Court, the property of a neutral held in its custody pending adjudication, whenever the Crown duly declared that it was necessary for the defence of the realm to requisition it. As part of the reasoning of the judgment their Lordships dealt with two points: first, that such requisitioning imposed no greater burden on the neutral than was borne by the subject, but rather less; and, second, that, if on comparison of the municipal laws of different countries the power of requisitioning was found to be exercisable in some cases with compensation and in some without (of which latter class this country was an example: p. 100), this circumstance would only show that the right contended for was, as against the neutral, as moderate as any municipal law warrants, and more so than what is warranted by our own. The legislation on the subject of national defence was not material, and was not discussed.

I think it is plain that the judgment in *The Zamora* (1) made, and could make, no attempt to formulate an exhaustive definition of the prerogative as to requisitioning; that it took and could only take decisions on the subject as it found them, in order to draw from them legitimate inferences throwing light on the matter in hand. The *Shoreham Case*, as it is now called, for obvious reasons meagrely reported as to the facts under the name of *In re A Petition of Right* (2), was the most recent exemplification of the ancient rule traced back to the Year Books that for the purpose of repelling invasion, the King, and indeed the subject too, may enter another's close in order to raise bulwarks therein without committing a trespass. Rightly or wrongly, the facts of the

(1) [1916] 2 A. C. 77.

(2) [1915] 3 K. B. 649.

Shoreham Case (1) were assumed to have been analogous to the case of raising bulwarks. H. L. (E.)

1920

No question arose of the taking of buildings for the mere use of administrative officials, although employed in one of the combatant branches of the administration. The statement about the absence of compensation was an exact statement of the state of the reported cases then existing. It did not purport to lay down that no right to compensation could exist in law, but merely recorded that none had been decided to exist. The statement that no Court ought, in time of war, to require of the officers of the Crown proof (ex hypothesi public proof) of the reasons of State, which had led them to hold that in a particular case a certain course should be taken, seems to me to be an obvious statement. It is not in conflict with what seems to me to be an equally obvious proposition—namely, that when the Court can see from the character and circumstances of the requisition itself that the case cannot be one of imminent danger, it is free to inquire whether the conditions, resting on necessity, which were held to exist in the *Shoreham Case* (1) are applicable to the case in hand. If so, the argument in the judgment of *The Zamora* (2) did not touch such a case. Unless the Court has such a power, the mere fact that the competent military authority honestly believed that what he demanded was needed for the defence of the realm, would, on the appellant's argument, enable everything to be taken and nothing paid. Of course, with the progress of the art of war, the scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries, as was resolved in the *Saltpetre Case* (3); but there is a difference between things belonging to that category of urgency, in which the law arms Crown and subject alike with the right of intervening and sets public safety above private right, and things which, however important, cannot belong to that category, but, in fact, are simply committed to the general administration of the Crown.

ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Sumner.

(1) [1915] 3 K. B. 649.

(2) [1916] 2 A. C. 77.

(3) 12 Rep. 12.

H. L. (E.) My Lords, I think that the judgment of the Court of
1920 Appeal was in accordance with the law, and ought to be
ATTORNEY- affirmed.
GENERAL

v.
DE
KEYSER'S
ROYAL
HOTEL.

LORD PARMOOR. My Lords, the question in debate in this appeal is whether the respondents are entitled to rent or compensation for the temporary use and occupation of the De Keyser's Royal Hotel, on the Thames Embankment. Possession of the hotel was taken, during the war, by the Executive Government, as representing the Crown, for purposes admittedly connected with the defence of the realm. It is not necessary to restate in detail to your Lordships the negotiations and letters which passed between the representatives of the Executive Government and the respondents in connection with taking possession of the hotel.

On May 8, 1916, Mr. Fane, of the Office of Works, attended at the hotel to take over possession from Mr. Whinney, who delivered possession by giving the keys to Mr. Fane. Mr. Whinney protested against the proceedings, and only surrendered possession under protest. It was stated that the Office of Works did not recognize any claim for occupation rent, and required that any claim for compensation should be sent to them for transmission to the "Defence of the Realm Losses Commission," and that the premises had been commandeered for military purposes under the Defence of the Realm Acts. It is contended by the appellant that compensation, if payable at all, is only payable *ex gratia* at the discretion of the Commission, and not as a matter of legal claim. This Commission was appointed to inquire and report to the Treasury with regard to claims for direct and substantial loss and damage "in cases not otherwise provided for." In my opinion the case under appeal is a case "otherwise provided for," and therefore a case which the Commission would have no jurisdiction to entertain.

On February 14, 1917, the respondents presented a Petition of Right, alleging that Mr. Whinney had delivered up possession of the hotel to representatives of the Crown, and that the use and occupation thereof by the Executive Government was by

permission of respondents, and they claimed a sum as rent in respect thereof. Having come to the conclusion that the representatives of the Crown took possession under rights conferred by statute, it is not necessary to determine whether or not there was any use and occupation of the hotel by permission of the respondents. The respondents further claimed that they were entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842, and it is under this head that a declaration had been made by the Court of Appeal in their favour. On October 15, 1917, the Attorney-General filed his answer and plea, on behalf of His Majesty, traversing the allegation in the petition that Mr. Whinney voluntarily delivered up possession of the hotel to the representatives of the Crown, and that the Crown's use and occupation of the hotel was by permission of the respondents, and pleading that such possession was properly and lawfully taken by virtue of His Majesty's Royal Prerogative, as well as by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the Regulations issued thereunder, and that His Majesty had acquired no right in or over the premises, beyond the right to take and use the same for so long as might be necessary for securing the public safety in the defence of the realm during the continuance of war. Peterson J. dismissed the petition with costs, but this judgment was reversed in the Court of Appeal, and a declaration made that the respondents were entitled to a fair rent for use and occupation by way of compensation under the Defence Act, 1842.

The first question, raised and argued at great length before your Lordships, was whether the Executive Government could justify their action in taking possession of the hotel, without payment of rent or compensation, under the sanction of the Royal Prerogative. The Royal Prerogative connotes a discretionary authority or privilege, exercisable by the Crown, or the Executive, which is not derived from Parliament, and is not subject to statutory control. This authority or privilege is in itself a part of the common law, not to be exercised arbitrarily, but "per legem" and "sub modo

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Parmoor.

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Parmoor.

legis." In the present appeal, it is not alleged that, if the Royal Prerogative did authorize the taking of possession of the premises of the respondents, for temporary use and occupation, without payment of rent or compensation, the authority was used improperly or in an arbitrary manner. Under this head no objection is put forward.

The growth of constitutional liberties has largely consisted in the reduction of the discretionary power of the executive, and in the extension of Parliamentary protection in favour of the subject, under a series of statutory enactments. The result is that, whereas at one time the Royal Prerogative gave legal sanction to a large majority of the executive functions of the Government, it is now restricted within comparatively narrow limits. The Royal Prerogative has of necessity been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion. A similar tendency may be traced in the growth of our legal system. Portions of the Common Law have been systematically incorporated in or modified by Acts of Parliament, and in this way the obligations which the law imposes have become more definite, and more certain in their application. Apart from the implication from precedents, which will be referred to later, the appellant states that he relies on the Royal Prerogative, because, in a case of necessity for the public defence, the Crown has by the common law a prerogative right, which has not been abated, abridged or curtailed by any of the Defence Acts of 1842–1873, or by any other statute, to enter upon or to take possession of, or to occupy and use, the land of any subject without payment of compensation. It is not necessary to inquire how far, in certain cases of necessity, for the public defence, the Executive has power to act without statutory authority, but a generalization of this wide character requires careful analysis in its application to special conditions such as have arisen in the present appeal.

In this instance the De Keyser Hotel was required for administrative purposes. Under modern conditions the use and occupation of land for administrative facilities is a matter of necessity for public defence, but the necessity is not of the

same character and cogency as arise when the use and occupation of land is required on the occurrence of invasion, or during the occurrence of actual fighting. On this point I agree with the decision of the Court of Appeal. Assuming that there is a public necessity to take possession of land for administrative purposes in connection with public defence, there can be no reason why this necessity should be urged as an answer to a claim for compensation. It is clear on the negotiations and correspondence that Mr. Whinney did not raise any objection to handing over the hotel for the use and occupation of the Executive Government, but that his protest was limited to the claim of the Executive Government to take the hotel, and, at the same time, to deny any claim for compensation except such as might be offered, as a matter of grace, by a reference to the Defence of the Realm Losses Commission. An illustration of the distinction, which arises in the character and cogency of the necessity when land or buildings are required for the exigency of the public service, is to be found in s. 23 of the Defence Act, 1842, which provides certain safeguards for the protection of the subject "unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings or other hereditaments shall be so taken."

It is further noticeable that the prerogative right claimed is limited to an entry upon, or to taking temporary possession of, or to the temporary occupation and use of the land, of any subject without payment of compensation. It is not claimed that it can be extended to a case of disseisin. Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown. It is not easy to see what the distinction is between disseisin and an indefinite use and occupation, which may extend beyond the estate of any particular owner. The later statute law gives the same claim to compensation to the subject in either case. An analogy arises in the case of taxation. Money is of primary necessity for public defence during war, but it has long been established that in order to obtain the requisite supplies, the Executive must follow constitutional precedent, and obtain

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE

KEYSER'S
ROYAL
HOTEL.

Lord Parmoor.

H. L. (E.) 1920
 ATTORNEY-GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 —
 Lord Parmoor.

Parliamentary sanction. If, however, it could be established that there had been at one time such a prerogative right as is claimed by the appellant, I am unable to accept the further proposition that such right has not been abated, abridged, or curtailed by any of the Defence Acts, 1842-1873, or any other statute. The provisions, however, of the statute law, as they affect the Royal Prerogative which the appellant claims, will be considered subsequently.

The precedents on which the appellant relies in support of his appeal are *Hampden's Case* (1); *The Saltpetre Case* (2); *Hole v. Barlow* (3); and *The Zamora*. (4) No one would dispute the high character of the arguments of Mr. St. John against the Crown in the case of ship money, but admissions made in such an argument do not constitute precedents, and the arguments applicable to the Royal Prerogative before the revolutionary period must be read subject to the restrictions which have been subsequently imposed. Duke L.J., in his exhaustive review, refers to the judgments of two of the judges whose opinions were given adversely to the claim of the Crown, and quotes passages from the judgments of Crooke J. and Hutton J. The quotation from Crooke J. is: "The law provideth a remedy, in case of necessity and danger; for then the King may command his subjects, without Parliament, to defend the kingdom. How? By all men of arms whatsoever, for the land; and by all ships whatsoever, for the sea, which he may take from all parts of the kingdom and join them with his own navy; which has been the practice of all former Kings."

This opinion of Crooke J. would in any case be no precedent for the claim made in the present appeal, but it is doubtful whether the Royal Prerogative would at the present time cover so wide an exercise of authority. During the war a Conscription Act was passed and Parliamentary authority was obtained. The quotation from Hutton J. is: "The care for the defence of the Kingdom belongeth inseparably to the Crown." There is no need to question the accuracy of this

(1) 3 How. St. Tr. 825.

(2) 12 Rep. 12.

(3) 4 C. B. (N. S.) 334.

(4) [1916] 2 A. C. 77.

general statement, but it cannot be intended to cover the proposition that the Executive Government is entitled, without regard to the limitations which have been imposed from time to time, to take all such steps as in the discretion of the Government, for the time being, may be considered necessary for this purpose.

The *Saltpetre Case* (1) was decided in 1606, at a time when the claim to act by Royal Prerogative was carried to an extreme limit. This case, however, is no precedent for the contention put forward by the appellant. The saltpetre was taken under the Right of Purveyance, and payment was made. Purveyances were abolished in 1660 by 12 Car. 2, c. 4. The volume of extracts from Public Records made for the purposes of this case by the Record Agent contains warrants for the searching for saltpetre, but in every case on the payment of rent or compensation. The importance of the case consists in the terms of the resolution of the judges :—

“ When enemies come against the realm to the sea coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the Common Law, every man may come upon my land, for the defence of the realm, as appears 8 Ed. 4, 23. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and everyone hath benefit by it; but after the damage is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance: and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 H. 8, fol. 15.”

A right common both to the Crown and all subjects is not in the strict sense a prerogative right of the Crown. Royal Prerogative implies a privilege in the Crown of a special and

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Parmoor.
—

(1) 12 Rep. 12.

H. L. (E.)
 1920
 ATTORNEY-
 GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 —
 Lord Parmoor.
 —

exclusive character, but in any case the illustrations contained in the resolution cannot be relied upon in support of the claim made by the appellant. To take premises for administrative purposes is essentially different from an entry upon land, adjoining to the coast, to protect the realm from a landing by enemy forces. The analogy of plucking down a house, if the next be on fire, for the saving of a city or town, is an apt instance of the restrictive limitations under which the right referred to in the resolution can be exercised, and it would be impossible to suggest that any subject would have been entitled to take possession of the hotel of the respondents for temporary use and occupation. A statute of 4 Hen. 8, c. 1 (1512), which was to endure to the next Parliament, makes special provision for the protection of the County of Cornwall against invasion from Bretayne and also the Haven of Brest, and authorizes everyone of the King's subjects under the conditions mentioned to enter upon land for the making of bulwarks, etc., without any manner of payment to be demanded or any manner of action, by any manner of person or persons at any time thereafter to be attempted. This statute illustrates the nature of a right, which is based, not on an exclusive privilege of the Crown, but on the duty of all subjects within the specified area to make common cause in defence of the realm. Duke L.J. refers to a series of cases between subjects in which there was no determination of the rights as between the Crown or the Executive Government and the subject. The decisions in these cases do not, in my opinion, assist to solve the questions raised in this appeal.

The Zamora (1) was a prize case, which raised a question of the authority of Royal Prerogative in International Law and of the right to requisition vessels or goods in the custody of the Prize Court of a belligerent power. As regards the authority of the Royal Prerogative the dictum of Lord Stowell in *The Fox* (2) was disapproved, and it was held that, prior at any rate to the Naval Prize Act, 1864, there was no power in the Crown, by Order in Council, to prescribe or alter the law which Prize Courts have to administer. So far the case

(1) [1916] 2 A. C. 77.

(2) (1811) Edw. 311.

cannot be quoted in favour of the claim to take possession of the property of the subject without payment of compensation. In the course of his judgment Lord Parker does incidentally refer to the authority of the Royal Prerogative within the domain of municipal law, but this was not a matter in issue in the case, and there was no argument addressed to the question now in appeal before your Lordships. So far as the *Shoreham Case* (1) is concerned, it need only be added that Lord Parker was sitting in your Lordships' House when the arrangement was come to which made a formal judgment unnecessary. The dictum of Willes J. in *Hole v. Barlow* (2) is not in favour of the contention of the appellant. It states the general proposition that every man has a right to the enjoyment of his land, and then, by way of illustration, limits the application of the power of the Royal Prerogative to the event of a foreign invasion. Apart from legal precedent, it was urged by the appellant in the Court of Appeal during the argument, that, where lands had been taken over for temporary use and occupation for the purposes of the Defence of the Realm, without obligation on the part of the Crown to pay rent or compensation, special commissions had been issued from time to time to determine what payment should be made by the Crown *ex gratia*. Consequently a search was made with the result stated in the judgment of the Master of the Rolls. "The result of the searches which have been made is that it does not appear that the Crown has ever taken subject's land for the defence of the country, without paying for it; and even in the Stuart times I cannot trace any claim by the Crown to such a prerogative." These latter words are important in considering the claim of the Executive Government in the present case to act under the Royal Prerogative. If no precedents can be found prior to the year 1688 of a claim to use and occupy the land of the subject for an indefinite time without the payment of compensation, it would be improbable that such precedents would be found at a later date.

The documents and warrants extracted from Public Records give no support to the claim put forward by the appellant. A

(1) [1915] 3 K. B. 649.

(2) 4 C. B. (N. S.) 345.

H. L. (E.)

1920

ATTORNEY-
GENERAL

v.

DE

KEYSER'S
ROYAL
HOTEL.

Lord Parmoor.

H. L. (E.) 1920
 ATTORNEY-GENERAL
 v.
 DE
 KEYSER'S
 ROYAL
 HOTEL.
 Lord Parmoor.

large number of them are concerned with the acquisition of estates in land, which admittedly could not be acquired compulsorily by the exercise of the Royal Prerogative. In some of the instances it is difficult to determine whether an estate in the land was acquired or possession was taken for temporary use and occupation. The extracts to which the attention of your Lordships was specially directed during the argument are as follows. On November 24, 1668, and on December 22, 1688, there are two ordinance minutes ordering in one case the payment of rent for ground upon which a battery is standing, and in the other case compensation for damage at the time of "Ye proveing the Morter peece nere Bishopp's hall." Both these minutes appear to relate to a case of temporary use and occupation. On September 4, 1805, a letter was written urging the necessity of obtaining the mills at Cheshunt for purposes of increasing the supplies of gunpowder for His Majesty's service. The Board concurred in the opinion, and recommended to the Master-General to authorize the mills of Cheshunt to be taken possession of under the Defence Act, which will be attended also with the further advantage of removing some legal obstacles arising from a claim of the poor of the neighbourhood to have their corn ground at the mill. Proceedings were accordingly taken under the Defence Act to get possession of the mills, in order that, by the acquisition of the water, the manufacture of gunpowder might be increased. The subsequent orders and minutes relate to valuation for the purchase of all interests in the premises. At this date the Act 43 Geo. 3, c. 55, was in force, authorizing His Majesty to survey and mark out ground wanted for public service and to treat and agree for "possession and use of it during such time as the exigence of the public service shall require," and in default of agreement compensation to be paid for possession and use, to be ascertained by a jury. In the following year a further Act was passed enabling land required for the exigencies of the service to be purchased absolutely and for ascertainment of the price by a jury in default of agreement. These acts were temporary in character, but contained provisions similar to those

which were made permanent in the Defence Act, 1842. On June 20, 1813, a report was made on the claims of a Mr. Cowl, of Margate, and other persons in reference to damage done by stopping up gateways by which farmers drew up seaweed from the beach as a manure for lands at a time when an enemy landing was apprehended. A money payment appears to have been made in each case with the further recommendation that the gateway should be reopened at the expense of the Government. It was stated at the hearing before the Court of Appeal that the documents which had been extracted were illustrative, and that there was no reason for thinking that a further search would disclose documents of a different import. The conclusion is that the Executive Government has not established a right under the Royal Prerogative to take the hotel of the respondents for temporary use and occupation during war without the payment of compensation or by referring the respondents to a Commission which could only make grants "ex gratia" within the limits of its jurisdiction.

I am further of opinion that the plea of the appellant that the prerogative right of the Crown, whatever it may have been, has not been abated, abridged or curtailed by any of the Defence Acts, 1842-1873, or by any other statute, cannot be maintained. I propose to examine the main statutory provisions which regulate the rights of the subject and the obligations of the Executive when lands or buildings are taken temporarily for use and occupation on the occasion of a public exigency. The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. I think that the statutory provisions applicable to the interference by the Executive with the land and buildings of the respondents, bring the case within the above principle. It would be an untenable proposition to suggest that Courts

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Parmoor.

H. L. (E.) of law could disregard the protective restrictions imposed by statute law where they are applicable. In this respect the sovereignty of Parliament is supreme. The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or, as stated in Bacon's Abridgement, where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong. Statutes which provide rent or compensation as a condition to the right of the Executive to take over the temporary possession of lands or buildings on the occasion of public exigency come, in my opinion, within the category of statutes made for the advancement of justice and to prevent injury and wrong. This is in accord with the well-established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment. I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.

In 1798 (38 Geo. 3, c. 27) power is given to take possession of land during such time as the exigencies of public service should require, with a provision for compensation; but this Act was limited in its operation to the continuance of the then present war.

In 1803, by 43 Geo. 3, c. 55, similar powers are given. This, again, was a temporary Act during the then present war with France. A doubt arose whether this Act would enable the Executive to take land for a definite period of time, extending beyond the immediate exigency. In consequence it was repealed in 1804, and 44 Geo. 3, c. 45, enacts that land may be acquired either by absolute purchase for public service or for use and possession during such time as the exigence of the public service may require. Sects. 11 and 12 provide compensation either for the purchase of land or for its temporary

1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
—
Lord Parmoor.

use. In 1842 the Defence of the Realm Act was passed to consolidate and amend the laws relating to the services of the Ordnance Department and the vesting and purchase of lands and hereditaments for those services, and for the defence and security of the realm. This Act has been subsequently amended, but not on any subject material to this appeal, prior to 1914. Sect. 16 empowers the principal officers of Her Majesty's Ordnance to treat and agree with the owner or owners of lands, buildings, and hereditaments, or with any person or persons interested therein either for the absolute purchase thereof or for the possession or use thereof during such time as the exigence of the public service shall require. Sect. 19 enacts that if bodies or other persons thereby authorized to contract on behalf of themselves or others or other person or persons interested in any such lands, buildings, or other hereditaments, shall, for the space of fourteen days next after notice in writing decline to treat or agree, or shall refuse to accept such sum of money, as shall be offered for absolute purchase, or such annual rent or sum as shall be offered for hire or rent thereof either for a time certain, or for such period as the exigence of the public service may require, the principal officers may require two or more justices of the peace, or other authority named, to put them or any person appointed by them into immediate possession of such lands, buildings, or other hereditaments. Then follows a complete provision for summoning a jury to assess the compensation to be paid either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof, as the case may be.

Sect. 23 provides that no such lands, buildings, or other hereditaments shall be taken without the consent of the owner or owners or other interested person or persons unless the necessity or expediency of the taking the same has been certified as directed, or "unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings, or other hereditaments shall be taken." This latter provision is important, since it clearly shows that the Legislature was providing against such an emergency as

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
Lord Parmoor.

H. L. (E.) invasion, which might occur during a period of war, and introducing in such a case an exceptional procedure.

ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
Lord Parmoor.

Sect. 34 empowers the principal officer of Her Majesty's Ordnance to bring actions, suits, or other proceedings, provided that in all such actions, suits, or other proceedings, the legal rights, privileges, and prerogatives of Her Majesty, her heirs and successors, shall not be defeated or abridged. It is not alleged that procedure by Petition of Right defeats or abridges the legal rights, privileges, or prerogatives of the Crown, if the conditions are such as entitle the respondents to resort to this form of procedure. If this Act and the amending Acts prior to 1914 had stood alone it would have been no answer to say that the statutory conditions were inconvenient or unduly cumbrous to meet the exigency of the public service in defence of the realm. It is for Parliament to determine what the exigency of the public service may require, and, if amending provisions are found to be necessary, to enact them in an amending statute. It will appear subsequently that this course was followed on the outbreak of the war in 1914.

It was further argued on behalf of the appellant, that, apart from the Royal Prerogative, or from any power vested in the Executive under preceding statutes, a subject was deprived of his right to compensation by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the Regulations issued thereunder. Under this Act "His Majesty in Council has power during the continuance of the present war to issue Regulations for securing the public safety and the defence of the realm." There is a special provision that such Regulations may provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making byelaws or any other power under the Defence Acts, 1842 to 1873, or the Military Lands Acts, 1891 to 1903. The Regulations issued authorize the competent naval or military authority, and any person duly authorized by him, where for the purpose of securing the public safety or defence of the realm it is necessary so to do, to take possession of any land, building, or other property, or to do any other act involving interference with private rights

of property which is necessary for the purpose aforesaid. The effect of this Regulation is to enable the competent naval or military authority to take immediate possession of land or buildings, where it is necessary for securing the public safety or defence of the realm. In Regulation 62, the competent naval or military authority may be any commissioned officer, not below the rank of a Lieutenant-Commander in the Navy, or Field Officer in the Army or Air Force. There is no provision for compensation for acts done under the powers conferred by Regulation 62. Nor is any such provision necessary. Compensation was already assured under statutory enactment. Regulation 2B does contain a method of determining the price to be paid on taking possession of war material, food, forage, and stores in default of agreement, and the attention of your Lordships was not called to any preceding statute containing a right to compensation.

My Lords, I agree in the view expressed by Warrington L.J. that the Defence Acts, 1842 to 1873, and the Act of 1914 and the Regulations made thereunder must be read together. The power to take possession of land or buildings for temporary use or occupation is derived from the Defence Act, 1842, and the Act of 1914, and the Regulations made thereunder adapt the exercise of the powers conferred by the Defence Act of 1842 to the exigencies of modern warfare during a period of war; but they do not affect the provisions of the Defence Act, which confer a right to compensation, and provide procedure for assessment of the amount in default of agreement. I think that there is no difficulty in applying the ordinary rules of construction, but, if there is room for ambiguity, the principle is established that, in the absence of words clearly indicating such an intention, the property of one subject shall not be taken without compensation for the benefit to others or to the public: *Attorney-General v. Horner* (1); *London and North Western Ry. Co. v. Evans*. (2). So long as the possession of land or buildings can immediately be taken for purposes of public safety there is no inconsistency in subsequently determining under statutory procedure the

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
Lord Parmoor

(1) (1884) 14 Q. B. D. 245. (2) [1893] 1 Ch. 16.

H. L. (E.) amount of payment either by way of rent or compensation.
 1920 It is not necessary in your Lordships' House to distinguish
 ATTORNEY- the present appeal from *In re A Petition of Right*. (1)
 GENERAL Peterson J. thought that the present case was covered by the
 v. judgment of the Court of Appeal in that case, but when that
 DE case came before your Lordships' House, an arrangement was
 KEYSER'S made rendering it unnecessary to give a formal judgment.
 ROYAL
 HOTEL.

Lord Parmoor.

The appellant in the statement of contentions tabled in the appellant's case, claimed "that the Legislature had, by the Defence of the Realm (Acquisition of Land) Act, 1916, recognized the existence of and had confirmed the prerogative." Reliance is placed on the words in s. 1, which allows the Government department in possession of lands to continue in possession for the specified time, where possession had been taken, whether in exercise or purported exercise of any prerogative right of His Majesty, or of any powers conferred by or under any enactment relating to the defence of the realm. This section does not enlarge or extend the Royal Prerogative in any direction, or deprive the subject of compensation if, apart from this section, he would have been entitled to claim it. In the letter of May 9, 1916, the Controller of Supplies states that the premises have been commandeered by the military authorities under the Defence of the Realm Act, and this statement is, in my opinion, well founded.

If the respondents are entitled to a declaration in the terms of Head No. 4 of the Petition of Right, the proper form of procedure to obtain such a declaration in favour of a subject against the Crown has been followed. There is no allegation of any tortious conduct on the part of the Crown. On the contrary the claim to compensation assumes that the entry on, and the taking of possession of, the hotel, are acts which are legally justifiable. In an ordinary case, under the Lands Clauses Acts, when promoters enter into possession of lands in conformity with their statutory rights, and delay or refuse to put in force the necessary procedure for the assessment of compensation in default of agreement, the remedy is by mandamus. This remedy would not be applicable against

the Crown. I did not understand the Attorney-General to raise any objection to the procedure by petition of right if the respondents could establish a claim to compensation, or to the form of the declaration made by the Court of Appeal.

My Lords, in my opinion, the appeal should be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed. The costs incurred by the respondents in respect of the appeal to be paid to them in the manner directed by 23 & 24 Vict. c. 34.

Lords' Journals, May 10, 1920.

Solicitor for the appellant : *Treasury Solicitor.*

Solicitors for the respondents : *Miller & Smiths.*

H. L. (E.)
1920
ATTORNEY-
GENERAL
v.
DE
KEYSER'S
ROYAL
HOTEL.
Lord Parmoor.

Unwed. BROOKS v. PRESCOTT.
48] 1 All E.R. 907.

Applied. BROOKES
v. PRESCOTT.
[1948] 2 K. B. 133

[HOUSE OF LORDS.]

H. L. (E.)*

O'ROURKE APPELLANT;

1920
Feb. 26.

AND

DARBISHIRE AND OTHERS RESPONDENTS.

Discovery of Documents—Privilege—Solicitor Trustee acting for Self and Co-trustees—Confidential Communications—Fraud—Sufficiency of Allegation—Protection of Documents relating to Possessor's own Case—Conclusiveness of Affidavit—Trustee and Cestui que Trust—Production of Documents on Ground of proprietary Right.

Professional privilege as a ground for resisting production of documents by trustees is not displaced by the fact that the solicitor consulted is himself a trustee and is acting as professional adviser to himself and his co-trustees.

In re Postlethwaite (1887) 35 Ch. D. 722 considered and explained.

Professional privilege does not attach to communications made by or to a solicitor for the purpose of carrying out a fraud; but, in order

* *Present*: VISCOUNT FINLAY, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

H. L. (E.)

1920

O'ROURKE

v.

DARBISHIRE.

to displace the privilege on this ground, a mere allegation of fraud in a pleading is not sufficient; a prima facie case of fraud must be made out in fact.

Dicta of Romer L.J. and of Lord Davey in *Bullivant's Case* [1900] 2 Q. B. 163, 168; [1901] A. C. 196, 203 considered.

Privilege claimed by a party on the ground that the documents relate exclusively to his own case is not limited to documents admissible in evidence in support of his case.

The fact that a party claiming privilege for a mass of documents is shown to have misapprehended the effect of one of the documents is not of itself a sufficient reason for refusing protection to all the other documents included in the same head of claim on the footing that the affidavit of documents is untrustworthy.

A plaintiff suing as the representative of the heir at law and next of kin of a testator, and claiming that the executors are trustees for those whom he represents of part of the testator's estate on the footing of an intestacy, is not entitled to the production of the trust documents as cestui que trust on the ground of proprietary right, if the question whether there was an intestacy is the issue to be tried in the action.

Decision of the Court of Appeal [1919] 1 Ch. 320 affirmed, the respondents undertaking to produce certain documents exempted from production per incuriam by the order of the Court of Appeal, Viscount Finlay dissenting on special grounds as to two other documents.

APPEAL from an order of the Court of Appeal (1) reversing an order of Peterson J. for the production of documents in an action.

The action related to the testamentary dispositions of Sir Joseph Whitworth (hereinafter called the testator), who died in January, 1887, possessed of real and personal estate of considerable value.

By his will, dated December 18, 1884, the testator appointed his wife, Dame Mary Louisa Whitworth, R. C. Christie, and R. D. Darbishire (hereinafter called Whitworth's executors) to be executors and trustees thereof. He bequeathed the residue of his personal property which might be lawfully bequeathed for charitable purposes to certain school boards for educational purposes, and gave any property not thereinbefore effectually disposed of to the Department of Science and Art for the like purposes. By a first codicil dated February 13, 1885, the testator revoked the gift to the Department of Science and Art, and gave the property comprised therein and all other property not otherwise

effectually disposed of to his executors in trust for themselves for their own absolute use and benefit in equal shares, stating nevertheless that it was his earnest wish that they should apply the ultimate residue for such educational purposes as he had desired to promote by virtue of his will and codicil, with a proviso that this expression of his wish should not impose any fetter or obligation on his executors or any of them. This codicil also contained a provision declaring that R. D. Darbishire should, notwithstanding that he was an executor and trustee, be at liberty to act as the solicitor of the testator's trust estate, and should be paid all proper costs, charges, and expenses in the same manner as if he were not an executor or trustee. By a second codicil dated June 16, 1886, the testator revoked his residuary bequest in favour of the school boards, and to that extent augmented his residuary gift to his executors, releasing them from any wish that any of his property should be applied in favour of school boards, and he declared that it was his wish and intention that his residuary gift of real and personal estate as augmented should belong to his executors respectively for their own use and application, they being each of them aware of the general nature of the objects for which he would himself have applied such property if he had been able to make such application by his will or could bind them. By a fourth codicil dated July 23, 1886, the testator declared that the gift to his executors in the first codicil as augmented by his second codicil should include all the real and personal estate not otherwise disposed of by his will or any codicil thereto, and he accordingly gave them such real and personal estate in equal shares for their own benefit, having full confidence that they would respectively carry out his wishes to the utmost of their power, but nothing in that codicil or in his will or first three codicils was to be construed so as to impose any trust upon them or in any manner to abridge or qualify their absolute ownership or rights.

At the date of the testator's death Mrs. Fanny Uniacke was his heiress at law, and she and Mrs. Helen McGowan were his only next of kin.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.

H. L. (E.) Shortly after the testator's death Mr. J. W. McGowan,
1920 a son of Mrs. McGowan, acting on behalf of his mother,
O'ROURKE was threatening Whitworth's executors with proceedings
v. impeaching the will and codicils, but the executors declined
DARBISHIRE. to make any arrangement with him without the concurrence
 of Mrs. Uniacke.

By an indenture dated August 26, 1889, Mrs. Uniacke conveyed to J. W. McGowan one moiety of all the real estate of which the testator died seised or possessed and to which she was or might be entitled as his sole heiress at law. By an indenture, dated December 21, 1889, made between Mrs. Uniacke of the first part, Mrs. McGowan of the second part, J. W. McGowan of the third part, and Whitworth's executors of the fourth part, in consideration of a money payment by the executors, all the real and personal estate of the testator was released to the parties thereto of the fourth part, as executors and residuary devisees and legatees of the testator, to the intent that the same might be for ever thereafter discharged from all claims and demands of the parties thereto of the first three parts.

All Whitworth's executors and Mrs. Uniacke and Mrs. McGowan had died before the commencement of the present action. In April, 1916, this action in its present form was brought by the appellant, suing as administrator de bonis non of Mrs. Uniacke, against the representatives of Whitworth's executors (the respondents), J. W. McGowan, and the representatives of Mrs. McGowan for a declaration that Whitworth's executors were (subject to the rights of the testator's widow) trustees for the testator's heiress at law and his next of kin of all his residuary real and personal estate, and for cancellation of the release of December 21, 1889, and for consequential relief.

The amended statement of claim, after setting out the will and codicils of the testator and the deeds of August 26, 1889, and December 21, 1889, alleged (para. 10) that the testator during the whole period in which the said will and codicils were signed by him was in a feeble state of health both mentally and physically, and was entirely guided in his

testamentary dispositions by the advice of Christie and H. L. (E.) Darbshire, and had no independent advice whatever.

1920

It also contained the following allegations :—

O'ROURKE

v.

DARBISHIRE.

“ 11. The Plaintiff charges that (A) there was either a secret trust communicated to Whitworth's executors by the testator in respect of the testator's residuary, real and personal estate and accepted by them which trust was never defined or that (B) there was such a secret trust which was defined but was invalid by reason of the Mortmain Acts or otherwise or that according to the terms of the will and codicils (c) Whitworth's executors took the said residuary real and personal estate for their own absolute use and benefit.

“ 12. The Plaintiff further charges that the form in which the testamentary dispositions of the testator was arranged or settled by the said Richard Copley Christie and Robert Dukinfield Darbshire was a mere fraudulent device or scheme for appropriating to the use of Whitworth's executors a very large portion of the testator's estate and that the said Dame Mary Louisa Whitworth was a party to the said scheme or device either before or after the same was devised by the said Richard Copley Christie and Robert Dukinfield Darbshire and adopted and took the benefit of it.

“ 13. The Plaintiff will upon obtaining the declarations asked for by the prayer take if necessary proper steps in the Probate Division of this Court to recall the probate of the said will and codicils.”

“ 25. Whitworth's executors were as to the residuary real and personal estate of the testator trustees subject to the rights of the widow for the testator's heiress-at-law and next-of-kin having regard to the facts hereinbefore stated and the course adopted by them in obtaining the execution of the several deeds hereinbefore stated was part of a fraudulent scheme to retain for their own use a large part of such estate. The true material facts in relation to the testator's will and codicil as hereinbefore alleged were improperly and fraudulently concealed from

H. L. (E.)
1920
O'BOURKE
v.
DARBISHIRE.

the said Fanny Uniacke and the consideration for the several deeds hereinbefore stated was wholly inadequate and illusory and such deeds respectively would never have been executed by the said several persons if the true material facts which it was the duty of Whitworth's executors to disclose had been disclosed by them to such persons respectively."

The respondents by their amended defence put in issue the allegations contained in para. 10 of the amended statement of claim and alternatives (A) and (B) in para. 11, and denied each and every of the allegations contained in paras. 12 and 25.

In pursuance of the usual order for production an affidavit of documents was filed on behalf of the respondents, but the judge held that it was insufficient, and ordered a further and better affidavit.

The documents in question on this appeal were numbered 434, 436 and 437 in the Second Schedule to the further affidavit. The deponents objected to produce the documents numbered 434 and 436 and, with certain exceptions, the documents numbered 437 on the following grounds:—

"As to the documents numbered 434 such documents consist solely of professional communications of a confidential character passing as regards that numbered 1 between the testator Sir Joseph Whitworth and his counsel and as regards that numbered 2 between Dame Mary Louisa Whitworth, Richard Copley Christie, and Robert Dukinfield Darbshire the executors appointed by the will of the said testator (who are for convenience hereinafter referred to as the Whitworth executors) and their counsel for the purpose of obtaining legal advice.

"As to the documents numbered 436 . . . the same consist solely of professional communications of a confidential nature which for the purpose of the said Whitworth executors or some or one of them obtaining legal advice have passed between them and their solicitors, Messrs. Darbshire & Tatham, Messrs. Darbshire, Tatham & Worthington or Messrs. Cookson & Co. from time to time advising on their behalf or on behalf of some or one of them.

“As to the documents numbered 437 . . . the notes and memoranda were made prepared or procured by the said Whitworth executors after the death of the said testator, which occurred on the 22nd January, 1887, and in view of the claims made against them in relation to the testator’s estate and the legal proceedings from time to time threatened or commenced against them relating to the said testator’s estate and were made solely for the purpose and with the intention of the same being laid before the solicitors to the Whitworth executors confidentially and in their professional capacity in order to obtain their legal advice.

H. L. (E.)
1920
O’ROURKE
v.
DARBISHIRE.

The entries in the diaries so far as we object to produce the same are entries in diaries kept since the death of the testator by the said Robert Dukinfield Darbishire . . . as a member of the said firm of Darbishire & Tatham or Darbishire, Tatham & Worthington or by the said Cookson & Co. in his or their business respectively as solicitor or solicitors from time to time for the said Whitworth executors. The drafts and copies of bills of costs which we object to produce are the drafts and copies of bills of costs subsequent in date to the death of the testator of Messrs. Darbishire & Tatham, Messrs. Darbishire, Tatham & Worthington, or Messrs. Cookson & Co. against the said Whitworth executors. The said entries in the said diaries and the said bills of costs relate solely to the said claims and the said threatened or commenced legal proceedings. To the best of our knowledge, information and belief the said documents numbered 434 and 436 and (so far as we object to produce the same) 437 either do not in any way relate to the matters in issue in this action or in so far as they do relate to the same relate solely to our case and to the case of our said co-defendants and not to the case of the plaintiff, and do not in any way tend to support the plaintiff’s case or impeach our own.”

No privilege was claimed by the deponents for certain other documents in No. 437, inasmuch as they related to the affairs of the testator during his lifetime.

The documents numbered 434 in the second schedule were,

H. L. (E.) (1.) draft of case and fair copy case and opinion of
 1920 Mr. Theobald; (2.) draft of case and two fair copies of each case
 O'ROURKE and joint opinion of Sir Horace Davey K.C. and Mr. G. P. C.
 v. DARBISHIRE. Lawrence. The documents numbered 436 were letters and
 telegrams from Lady Whitworth to Darbishire, as a member
 of the firms of Darbishire and Tatham or Darbishire, Tatham
 & Worthington, solicitors advising the Whitworth executors,
 from 1889 to 1892; similar letters and telegrams from Christie
 to Darbishire, as a member of the said firms, from 1888 to
 1896; press copy letters and telegrams from Darbishire,
 as a member of the said firms, to Lady Whitworth from
 1887 to 1896, and to Christie from 1887 to 1900; and also
 letters and telegrams passing between Richard Pennington,
 of the firm of Cookson & Co., solicitors advising the Whitworth
 executors, and Christie or Darbishire as one of the executors
 from 1889 to 1904. The documents numbered 437, so far as
 privilege was claimed for them, consisted of entries relating
 to the claims or contemplated or pending litigation heretofore
 mentioned in thirteen diaries kept by Darbishire in the course
 of his business as a partner in the said firms from 1884 to
 1892 and from 1897 to 1903; fifty-two bills of costs of Darbi-
 shire & Tatham or Darbishire, Tatham & Worthington against
 the Whitworth solicitors from 1887 to 1898, and twenty-one
 bills of costs of Cookson & Co. against the Whitworth solicitors
 from 1889 to 1897.

Upon an application by the appellant for the production of
 the documents Peterson J., having at the hearing with the
 consent of the respondents' counsel perused the two cases
 and opinions of counsel numbered 434, was of opinion that
 the appellant ought to have an opportunity of seeing them
 as being documents tending to support the appellant's case,
 and, as regards the case for the opinion of Mr. Theobald,
 he also thought that it ought to be produced on the principle
 laid down in *Russell v. Jackson* (1) as being a document which
 had come into existence during the testator's lifetime. As
 regards the documents numbered 436 he rejected the claim
 of the appellant to see them as a beneficiary on the ground that,

(1) (1851) 9 Hare, 387, 392; (1862) 10 Hare, 204.

before a person claiming to be a beneficiary can demand to see documents prepared at the expense of the estate and for the purpose of the estate, he must make out a prima facie case that he is a beneficiary, but he ordered production of the documents on the authority of *In re Postlethwaite*(1), on the ground that professional privilege did not obtain where the solicitor was also one of the executors or trustees. With regard to the claim for privilege on the ground that the documents did not support the appellant's case, but only tended to support the respondents' case—a claim which applied to all the documents numbered 434, 436 and 437—he came to the conclusion that the deponents had misapprehended the effect of those documents or failed to recognize that they might be of use to the appellant, and held that it followed, as a matter of necessary inference, that all the other documents included in that claim had been similarly misapprehended. This conclusion was, however, not extended by the learned judge to those documents included in number 436, which consisted of communications between the executors and their solicitors, Messrs. Cookson & Co. In his Lordship's opinion those documents prima facie fell within the protection of the claim to professional privilege, and the case was not affected by the charge of fraud contained in the statement of claim, as there was no suggestion that Messrs. Cookson & Co. were in any way implicated in the alleged fraud. He therefore held that those documents were privileged. As to the documents numbered 437 he held that the diary entries relating to business done by Darbshire for the executors and the bills of costs of Darbshire's firms stood upon the same footing as communications between Darbshire and the other executors and should be produced, but that Messrs. Cookson & Co.'s bills of costs against the executors were privileged from production as were also the notes and memoranda mentioned in the body of the second affidavit but not included in the schedule.

The respondents appealed, and there was a cross-appeal by the appellant.

(1) 35 Ch. D. 722.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.

H. L. (E.) The Court of Appeal (Bankes, Warrington and Scrutton L.JJ.)
1920 allowed the appeal and dismissed the cross-appeal.

O'ROURKE
v.
DARBISHIRE.

1920. Jan. 20, 22, 23, 26, 27, 29. *Hughes K.C.* and
J. B. Matthews K.C. (with them *Beddall*) for the appellant.
As to the claim for professional privilege, where a solicitor
is also a trustee and acts for himself and his co-trustees no
question of privilege arises. *In re Postlethwaite* (1) is an
authority for this proposition, and is so treated in the leading
text-books: Daniell's Chancery Practice, 8th ed., vol. i.,
p. 626; Seton's Judgments and Orders, 7th ed., vol. i.,
p. 94; and it was rightly decided. This privilege is grounded
on necessity, and extends no further than is absolutely necessary
to enable the client to obtain professional advice with safety :
Glyn v. Caulfield (2); *Parkhurst v. Lowten*. (3) No necessity
compels a trustee to instruct his co-trustee, who happens to
be a solicitor, for he can always consult an outside solicitor.
That is not a matter of necessity but of convenience only.
The privilege is the privilege of the client, and applies only
to letters written to or by the solicitor solely in his capacity
of solicitor. If the letters were written to or by him in his
character of co-executor or co-defendant privilege cannot be
claimed for them because he also wrote or received them
in his character of solicitor. In particular, communications
passing between co-defendants are not privileged, and the
fact that one of them is a solicitor does not affect the question :
Goodall v. Little (4); *Thomas v. Rawlings* (5); *Lewis v.*
Pennington (6); *Betts v. Menzies*. (7) Moreover, where the
co-defendants are co-executors they constitute only one person
in law. Several executors are all considered in law in the light
of an individual person : Bacon's Abridgement, vol. iii.,
p. 453; Sheppard's Touchstone, p. 488A; Williams on
Executors, 10th ed., vol. i., pp. 171, 715. The privilege applies
only to communications written for the purpose of seeking
or giving legal advice, and it is incredible that every one of

(1) 35 Ch. D. 722.

(5) (1859) 27 Beav. 140, 142.

(2) (1851) 3 Mac. & G. 463, 474.

(6) (1860) 29 L. J. (Ch.) 670, 672.

(3) (1819) 2 Swanst. 194, 216.

(7) (1857) 26 L. J. (Ch.) 528.

(4) (1851) 1 Sim. N. S. 155, 164.

the letters passing between Darbishire and his co-executors should have had that character. The affidavit of documents should be read most strongly contra proferentem : *Thomas v. Rawlings* (1) ; *Lewis v. Pennington*. (2) Further, this claim for privilege is displaced by the charge of fraud contained in the statement of claim. Where a solicitor is a party to a fraud no privilege attaches to the communications by or with him upon the subject, because the contriving of a fraud is no part of his duty as a solicitor : *Russell v. Jackson*. (3) The issue of fraud must be seriously stated, but if there is a genuine issue to be tried the privilege is gone : per Romer L.J. in *Reg. v. Bullivant*. (4) The decision of the Court of Appeal in that case was reversed by the House of Lords (sub nom. *Bullivant v. Att.-Gen. for Victoria* (5)) upon the special facts of the case, but Lord Davey states the law in the same way as Romer L.J. Lord Halsbury said that in order to displace the privilege there must be some definite charge of fraud, but the fact that a motion to strike out the statement of claim as disclosing no reasonable cause of action has been made and has failed, as happened in this case, affords some ground for saying that the charge of fraud is stated with sufficient precision for the purpose of excluding privilege. *Reg. v. Cox* (6) carries the matter no further. It cannot be successfully contended that the plaintiff must prove his charge of fraud without the only materials which would enable him to prove it. Further, the appellant can claim production of these documents on the ground of proprietary interest on the principle of *Talbot v. Marshfield*. (7) It is true that the persons whom the appellant represents do not take under the will, but they claim, not as outsiders, but through the executors, and are, on one view of the case, cestuis que trust under the testator. The defendants are trustees either for themselves as residuary devisees and legatees or for the heiress at law and next of kin of the testator. The appellant has such an

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.

(1) 27 Beav. 140.

(2) 29 L. J. (Ch.) 670.

(3) 9 Hare, 387, 392.

(4) [1900] 2 Q. B. 163, 168.

(5) [1901] A. C. 196.

(6) (1884) 14 Q. B. D. 153, 169, 172.

(7) (1865) 2 Dr. & Sm. 549.

H. L. (E.) interest in the estate as entitles him to see the trust documents.

1920 *Wynne v. Humberston* (1), which was a case of one defendant seeking discovery against a co-defendant, was a very anomalous case, and is distinguishable. As to the claim to privilege upon the ground that the documents relate solely to the defendant's case and not to the plaintiff's case, the generality of the claim affecting so many documents leads to the inference that it is not well founded. Where, looking at the nature and description of the documents, the Court sees that it is probable that the defendant's claim to protect them from inspection is misconceived, and that they may really contain matter which relates to the plaintiff's case, it may decline to accept the defendant's affidavit: *Att.-Gen. v. Emerson* (2); *British Association of Glass Bottle Manufacturers v. Nettlefold*. (3) The Court has ordered inspection in the teeth of the adversary's affidavit in the following cases: *Felkin v. Lord Herbert* (4); *Prince of Wales v. Lambe* (5); *Knight v. Marquess of Waterford* (6); *Jenkins v. Bushby* (7); *Gresley v. Mousley* (8); *Mansell v. Feeney* (9); *Harris v. Harris* (10); *Ponsonby v. Hartley*. (11) The object of this head of privilege is to prevent the premature disclosure of the evidence of the defendant's case: *Combe v. London Corporation*. (12) That is the only logical foundation of the rule. The expression "relate exclusively to the defendant's own case" is a phrase which is of modern introduction, and when it first came into use was understood as being merely equivalent to the older form of claim to protect from production documents which the defendant claimed were his evidences. The claim so to protect documents is based upon their evidential character. If not capable of being used either as primary or secondary evidence of the defendant's case—e.g., title deeds or copies or abstracts of, or extracts from, them—the documents are

(1) (1858) 27 Beav. 421.

(7) (1866) 35 L. J. (Ch.) 400.

(2) (1882) 10 Q. B. D. 191, 203, 204.

(8) (1856) 2 K. & J. 288.

(9) (1861) 2 J. & H. 320.

(3) [1912] A. C. 709.

(10) (1845) 4 Hare, 179.

(4) (1861) 30 L. J. (Ch.) 798.

(11) [1883] W. N. 44.

(5) (1848) 11 Beav. 213.

(12) (1842) 1 Y. & C. Ch. 631, 650.

(6) (1835) 2 Y. & C. Ex. 22, 41.

not entitled to protection. In all cases in which the claim for H. L. (E.) protection has been allowed the documents were in fact 1920 evidential in character. If not of this character the claim O'ROURKE v. DARBISHIRE. to protect them from production cannot be sustained either upon principle or upon authority: Wigram on Discovery, "Third Proposition"; also ss. 7, 20, 23, 27, 92, 114, 149, 183, 184, 290, 292, 299, 300, 333, 334, 346, 347, 349, 354, 356, 358, 359, 360, 361, 363, 364, 365, 366, 367, 368, 369, 372, 373, 387, 388, 393, 402, 419, 433, 439, 441; Seton on Decrees, p. 1052; Bray's Digest of Discovery, pp. 37, 41; Daniell's Chancery Practice, 7th ed., p. 1602; *Combe v. London Corporation* (1); *Knight v. Marquess of Waterford* (2); *Clegg v. Edmonson* (3); *Minet v. Morgan* (4); *Hastings Corporation v. Ivall* (5); *Att.-Gen. v. Emerson* (6); *North Australian Territory Co. v. Goldsborough* (7); *Morris v. Edwards* (8); *Budden v. Wilkinson* (9); *Frankenstein v. Gavin's Cycle Cleaning and Insurance Co.* (10); *Att.-Gen. v. Newcastle-upon-Tyne Corporation* (11); *Owen v. Wynn* (12); *Lyell v. Kennedy* (13); *Hey v. De la Hey* (14); Hare on Discovery, 2nd ed., pp. 2, 146, 184, 186, 187, 188, 189, 190, 193, 195, 196, 198, 200, 213, 277, 279, 280.

[LORD WRENBURY referred to *Bewicke v. Graham*. (15)]

No matter how unfavourably the Court may regard the merits of the case of the party seeking discovery, or his prospect of success, this ought not to stand in the way of his insisting upon production of all documents admitted to be in the possession of the adversary and to be relevant. It is recognized that under the old Chancery practice objections to production on the ground that the plaintiff's bill was of a fishing character would be and constantly were taken upon motion for production, but this was because under the

- | | |
|---|-----------------------------------|
| (1) 1 Y. & C. Ch. 631; affd. 15 L. J. (Ch.) 80. | 23 Q. B. D. 287. |
| (2) 2 Y. & C. Ex. 22. | (9) [1893] 2 Q. B. 432. |
| (3) (1856) 22 Beav. 125. | (10) [1897] 2 Q. B. 62. |
| (4) (1873) L. R. 8 Ch. 361. | (11) [1899] 2 Q. B. 478. |
| (5) (1873) L. R. 8 Ch. 1017. | (12) (1878) 9 Ch. D. 29. |
| (6) 10 Q. B. D. 191. | (13) (1883) 8 App. Cas. 217, 223. |
| (7) [1893] 2 Ch. 381, 383. | (14) [1886] W. N. 101. |
| (8) (1890) 15 App. Cas. 309; (1889) | (15) (1881) 7 Q. B. D. 400. |

H. L. (E.) practice then prevailing there was no opportunity of raising such objections at any earlier stage or by any other mode of procedure, unless the defect in the plaintiff's case was of such a character as to render the claim to relief or to discovery demurrable. Unless objection to production (as distinguished from discovery) could be taken by demurrer, of which no instance has been found, and which, if possible at all, must have been extremely rare, it could only be taken by the defendant in his answer, and then the plaintiff's exception to the defendant's answer could only assume the form of a motion for production, a motion for production always being in truth an exception to the answer. The practice of those days had nothing corresponding to the modern procedure by means of which a defendant can now protect himself against improper or premature discovery at an earlier stage. Under the rules of procedure now in force a defendant can apply to stay or dismiss an action on the ground that it is vexatious or an abuse of the process of the Court, or he can apply to strike out the statement of claim on the ground that it does not disclose any reasonable cause of action. Doubtless the old demurrer corresponded to a great extent with these steps, but a defendant can now resist an application for discovery either on the ground that for any reason the plaintiff ought not to have discovery or on the ground that the discovery is sought prematurely and ought not to be ordered unless and until the plaintiff has established his right to it by obtaining a decision in his favour upon some issue on which the right to discovery ought to depend. These courses being now open to a defendant, he ought not to be allowed to raise as objections to production matters which he might and ought to have raised at an earlier stage to discovery itself. In the present case the defendants applied to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The application having failed, the defendants submitted to an order for production in general terms. They ought not now therefore to be allowed to resist production on the ground that the statement of claim does not disclose any reasonable cause of action—a question already decided against them—

or on any other ground on which, if valid, they could have resisted discovery altogether or postponed it until the plaintiff had obtained a judgment setting aside the release which the defendants set up as a bar to his claim.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.

The principles of the old Court of Chancery are still applicable to questions of discovery: *Bustros v. White* (1); *Anderson v. Bank of British Columbia*. (2) In *Hope v. Brash* (3), relied on by Bankes L.J., the proviso to Order XXXI., r. 18, was misunderstood. That rule does not deal with discovery at all but with a process of ordering inspection of documents referred to in the pleadings, particulars, or affidavits of the adversary quite distinct from discovery, and was designed to afford, where appropriate, a substitute for discovery. It reproduces s. 6 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), which was extended to the Court of Chancery by the Chancery Procedure Act, 1854, s. 18. In *Hope v. Brash* (4) this was not drawn to the attention of the Court, probably because, having regard to the question before the Court in that case, it was not considered by the plaintiff's counsel material to his case. In *Wiedeman v. Walpole* (5) Vaughan Williams J. recognized the distinction between discovery and an order for inspection under Order XXXI., r. 18.

Tomlin K.C. and *Douglas Hogg K.C.* (with them *Dighton Pollock*) for the respondents. 1. As to proprietary right, this does not depend upon any question of discovery. Assuming that the appellant represents the heiress and next of kin, in order that the action may succeed, the release, the benefits of which the heiress at law has enjoyed for thirty years, must be got rid of. This right can only be asserted where it is not one of the issues in the action; but it is sufficient to say that the appellant has shown no *prima facie* right to the documents: *Wynne v. Humberston* (6); *Compton v. Earl Grey*. (7) 2. As to professional privilege, the privilege is

(1) (1876) 1 Q. B. D. 423.

(2) (1876) 2 Ch. D. 644.

(3) [1897] 2 Q. B. 188.

(4) [1897] 2 Q. B. 188.

(5) (1890) 24 Q. B. D. 537.

(6) 27 Beav. 421, 424.

(7) (1826) 1 Y. & J. 154, 157.

H. L. (E.) the privilege of the client, and there is no principle which suggests that there is any difference where the professional adviser is a co-trustee and where he is not. In *In re Postlethwaite* (1) there was no dispute as to the status of the beneficiary. The argument was based on proprietary right and fraud, and the judgment proceeded on those grounds. There is no definite decision that where co-trustees are co-defendants and one of them is a solicitor they cannot set up professional privilege. Eliminate the question of proprietary right, and the only question is whether one of several co-defendants can act as solicitor for the others. *In re Postlethwaite* (1) is not a positive authority for the proposition for which the appellant contends, and *Hamilton v. Nott* (2) is a positive authority to the contrary.

3. As to fraud, in certain cases the effect of fraud is to destroy professional privilege, but regard must be had to the sufficiency of the allegation and to the question how far that allegation can be substantiated. The form of the pleading may be very material in conjunction with the circumstances dehors the pleading in considering whether the privilege should be disallowed. *Reg. v. Cox* (3), which is the ruling case on this subject, shows that the Court has not laid down any hard and fast rule in the matter, but that it must judge for itself on the special facts of each particular case, and that every precaution should be taken against compelling unnecessary disclosures. That case indicates that a mere allegation of fraud is not sufficient to justify the Court in disallowing professional privilege. In order to displace professional privilege, there must be, first, a reasonably clear allegation of fraud in the pleadings connecting with the fraud the document sought to be disclosed: see *Reynell v. Sprye* (4); and, secondly, the Court must be satisfied aliunde that there is a reasonable probability of fraud. Lord Davey in *Bullivant's Case* (5), if his judgment is looked at as a whole, did not intend to assert that a mere allegation of fraud was sufficient, and the

(1) 35 Ch. D. 722.

(2) (1873) L. R. 16 Eq. 112.

(3) 14 Q. B. D. 153, 176.

(4) (1848) 11 Beav. 618.

(5) [1901] A. C. 196.

decision of the House was that there was in that case no fraud at all. So far as the statement of claim contains statements of fact the facts are perfectly consistent with the innocence of the respondents. It contains alternative allegations, one of which does not involve any charge of fraud at all. There is here no such allegation of fraud as would entitle the appellant to the disclosure which he claims. Looking at all the circumstances of the case, this is a fishing action of a most fantastical kind, and the pleader has cast about to see how he could frame some sort of pleading which would bring in the principle of *Russell v. Jackson*. (1) He is asserting a secret charitable trust and a trust which has failed. He cannot do that in the absence of the Attorney-General, and unless he can prove a secret trust, he can get nothing. If the respondents establish professional privilege that is the end of the appeal.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.

4. As to privilege on the ground that the documents relate exclusively to the respondents' case, it is said, first, that that claim can only be made in regard to documents which are admissible in evidence. There is no authority for that proposition. The ground of this privilege is stated to be that a party is not entitled to see his opponent's evidence until the trial, but it does not follow that the rule is strictly limited to documents which are admissible in evidence. The object is to protect the evidence of the party claiming protection, but that cannot be done except by protecting all the documents which relate exclusively to his own case. No argument can be founded on the use of the word "evidences." In former times that word was frequently used in a loose sense, and was not limited to documents which could be put in evidence. It must have been used in that sense in s. 23 of Wigram on Discovery when he speaks of the privilege of every defendant to withhold a discovery of the evidences relating to his own case, for in s. 346 he says "a plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his" (the defendant's) "case or of

(1) 9 Hare, 387.

H. L. (E.) the evidence by means of which that case is to be established.”

1920 That statement of the law is in accordance with the later
O’ROURKE authorities. This case now turns upon the rules : Order XXXI.,

v.
DARBISHIRE. rr. 12, 13, 18 (2.). The language throughout is “relating to.”

Either it must be contended that nothing need be disclosed except what is admissible in evidence, or a different meaning must be given to the two rules. In *Bewicke v. Graham* (1) there is nothing to show that the documents were necessarily admissible in evidence. In *Bulman v. Young* (2) protection was given to a document which could not have been admissible in evidence. In *Knight v. Marquess of Waterford* (3) the ratio decidendi was that the document might throw some light on the plaintiff’s case. In *Hey v. De La Hey* (4) the Court proceeded on the ground that the oath of the party seeking protection was displaced by reason of the nature of the documents. The rules as to discovery and inspection are in the same language and cover the same ground. There is no case in which it has ever been held in terms that a document not admissible in evidence has been not covered by the claim to protection. The appellant’s contention on this point is not well founded. Then it is said that the Court may go behind the claim for protection on the ground that the affidavit is untrustworthy. As to that Peterson J. was not justified because he held that the respondents were mistaken as to one document in rejecting their oath as to a mass of documents of a different character. In the similar case of *Leslie v. Cave* (5) Kekewich J. declined to adopt that course. *Roberts v. Oppenheim* (6) shows that the affidavit ought to be accepted as conclusive unless the Court can see distinctly that the oath of the party cannot be relied on ; and see *Bulman v. Young*. (2)

Hughes K.C. in reply referred to *O’Shea v. Wood* (7) on the question of professional privilege, and to *Barraclough v. Greenhough* (8) as showing that the question of the validity

(1) 7 Q. B. D. 400.

(2) (1883) 49 L. T. 736.

(3) 2 Y. & C. Ex. 22.

(4) [1886] W. N. 101.

(5) (1887) 56 L. T. 332.

(6) (1884) 26 Ch. D. 724, 734.

(7) [1891] P. 286, 289.

(8) (1867) L. R. 2 Q. B. 612.

of a devise of real estate was not within the exclusive jurisdiction of the Probate Division. H. L. (E.)

1920

O'ROURKE

v.

DARBISHIRE.

The House took time for consideration.

1920. Feb. 26. VISCOUNT FINLAY. My Lords, this case raises some important questions with regard to the right to require production of documents. The order made by Peterson J. for production was reversed by the Court of Appeal, from whose judgment the present appeal has been brought.

The writ in the action was issued on February 11, 1915. The plaintiff's claim is to the estate of the late Sir Joseph Whitworth, who died on January 22, 1887, leaving property real and personal said to be of the value of 1,000,000*l.* or more. The plaintiff claims as representing the heiress at law and one of the two next of kin of the testator. The representatives of the executors of Sir Joseph Whitworth are defendants. The defendants, Ellen McGowan and Elise Jenkins, are the executrices of the other next of kin of the testator.

The amended statement of claim was delivered on April 12, 1916, and the defences in June of the same year. The affidavit of documents was filed on May 1, 1917, and a further affidavit on May 3, 1918. In this last affidavit the defendants claimed that they were not bound to produce a number of documents on the ground of professional privilege, and on the further ground that the documents relate solely to the defendant's case and not to the plaintiff's case, and do not in any way tend to support the plaintiff's case or to impeach that of the defendants.

The statement of claim alleges that the deceased, Sir Joseph Whitworth, left a will dated December 3, 1884, and four codicils, the effect of which is stated, and that the widow, Lady Whitworth, Mr. Christie and Mr. Darbshire were the trustees and executors.

By the will and the first three codicils, it is alleged, provision was made for educational purposes, and various legacies were

H. L. (E.) given, the fourth codicil being in the following terms (para. 8 of the statement of claim) :—

O'ROURKE
v.
DARBISHIRE.
Viscount Finlay.

“ I Declare that the gift in my First Codicil of all other property if any not effectually disposed of beneficially by my said Will or by that Codicil to my wife and Richard Copley Christie and Robert Dukinfield Darbishire for their own absolute benefit in equal shares which gift I have augmented by the provisions of my Second Codicil shall include all the real and personal estate belonging to me and not otherwise disposed of by my Will or any Codicil thereto. And I accordingly give to them such real and personal estate in equal shares for their own benefit having full confidence that they will respectively desire to carry out my wishes to the utmost of their power but nothing in this Codicil or in my Will or my first three Codicils contained shall be construed so as to impose any trust upon my residuary legatees and devisees or any of them or in any manner to abridge or qualify their absolute ownership or rights and subject to the provisions herein contained I hereby confirm my said Will and first three Codicils.”

The statement of claim charges in paras. 11 and 12 that the trustees and executors took the residuary estate upon a secret trust which was never defined or was invalid by reason of the Mortmain Acts or otherwise (so that there would be a resulting trust for the heir at law and next of kin), and further that if the trustees and executors took for their own use and benefit, the dispositions had been obtained by them from the testator by fraud. Particulars were delivered under these two paragraphs stating that the fraud was in devising and carrying out the scheme embodied in the will and codicils whereby the testator was left in the belief that his wishes as to the disposal of the residue of his estate for educational purposes would be carried out by the executors, whereas they intended to appropriate the greater part of the testator's estate for their own use.

The statement of claim further alleges (para. 23) that a deed of release, dated December 31, 1889, was made between Fanny Uniacke of the first part, Ellen McGowan of the second

part, the defendant, Joseph Whitworth McGowan, of the third part, and Whitworth's executors of the fourth part. This deed recited that the parties of the first, second and third parts (the heiress and next of kin of the testator) had expressed their intention to take proceedings for the recall of the probate of Sir Joseph Whitworth's will and codicils, and that a compromise had been arranged on the terms that Whitworth's executors were to pay 75,000*l.* to be divided in the proportions specified between Fanny Uniacke and her children, and Ellen McGowan and Joseph McGowan. By this deed the first, second and third parties released to Whitworth's executors all the real and personal estate of the testator discharged from all claims. The statement of claim alleges that the execution of this release was procured by the fraud of Whitworth's executors in concealing from the other parties to the deed the facts as to the testator's will and codicils, as alleged earlier in the statement of claim, and that the executors appropriated to their own use a considerable part of the testator's estate.

H. L. (E.)
1920
O'Rourke
v.
DARBISHIRE.
Viscount Finlay.

The claim made in the action is that Whitworth's executors should be declared to be trustees for the heiress at law and next of kin of the testator, and that the deed of release should be cancelled or declared not to be binding.

The application for production of documents was heard in the first instance by Peterson J., and he made the order of July 31, 1918, for the production of the documents described in the schedule to that order. The Court of Appeal, consisting of Bankes, Warrington and Scrutton L.JJ., reversed this order, holding that the documents in question were covered by professional privilege. On the present appeal it was urged on behalf of the plaintiff:—

- (a) That the professional privilege did not exist, the solicitor being himself one of the trustees and executors ;
- (b) That the plaintiff had what was called a " proprietary right " as one of the cestuis que trust to see all documents relating to the trust ;
- (c) That no privilege exists where the communication

H. L. (E.)

1920

O'ROURKE

v.

DARBISHIRE.

Viscount Finlay.

has been made for the purpose of carrying out a fraud, and that this was the case with regard to the documents in question.

I shall take these points in order.

(a) Mr. Darbshire, one of the three trustees, acted as solicitor for the trust. The privilege is claimed in respect of communications between him as such solicitor and his co-trustees with reference to the trust. Peterson J. held, on the authority of *In re Postlethwaite* (1), that there could be no privilege where the solicitor consulted was himself one of the trustees. In my opinion any such proposition is erroneous in point of law, and I think that no such proposition is involved in the decision of North J. in that case. Trustees are entitled to consult a solicitor with reference to the affairs of the trust, and the communications between them and their legal adviser are privileged if for the purpose of obtaining legal advice. Why should such communications be less privileged because the solicitor is himself one of the trustees? There is no valid distinction between such communications with the solicitor who is himself a trustee, and such communications with a solicitor who is outside the trust altogether. Of course the privilege is confined to communications genuinely for the purpose of getting legal advice. It would not extend to mere business communications with reference to the trust, not for the purpose of getting legal advice. In the present case the affidavit of May 3, 1918, states that the communications were for the purpose of getting legal advice. No sufficient reason has been shown for discrediting this affidavit as untrue or as made under some misconception of fact or law. The statement is not inherently incredible, as was suggested on behalf of the appellant, and I think that the Court of Appeal was right in giving effect to it.

When the decision in *Postlethwaite's Case* (1) is examined it will be found that it does not really support the proposition contended for. The judgment must be read with reference to the facts of the case. The plaintiffs were admittedly cestuis que trust of the testator's property. They averred that one of

(1) 35 Ch. D. 722.

the trustees had himself secretly purchased part of the trust property and made a profit out of it. As cestuis que trust they had a right to see all the documents relating to the trust passing between the trustees, and this right could not be got rid of by the employment by the one trustee of the other as his solicitor.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.
Viscount Finlay.

(b) It was further urged that the plaintiff, as representing the heir and one of the next of kin of the testator, has a right to see any documents relating to the trust as being one of the cestuis que trust. I assume that the plaintiff is the representative of the heir and next of kin, but it does not follow that he is a cestui que trust. By the will and codicils the property is expressed to be given to the trustees and executors absolutely free from any trust. The plaintiff's case is put in the alternative. The first alternative is that the trustees and executors took the property on the terms of a secret trust, and that as such trust has failed owing to its not having been sufficiently defined or by reason of the statutes of mortmain, the representatives of the heir and next of kin of the testator are entitled to the property as on a resulting trust. Whether there was such a secret trust, which has failed, is a matter in dispute in the action, and at present there is not even a prima facie case that the plaintiff is a cestui que trust on this ground. The second alternative put forward by the plaintiff is that the trustees and executors induced the testator to leave the property to them by fraudulently leading him to believe they would apply it for educational purposes in accordance with his wishes, while, in fact, they from the first intended to appropriate it to themselves as it is alleged they have done. No more serious charge could well be put forward. It cannot be assumed to be true for the purpose of obtaining inspection of documents, and it is putting the case with great moderation to say that the appellant has not made out any prima facie case of the truth of these charges. There is a complete absence of evidence to show that the appellant is in a position to claim inspection on this ground, and there is nothing to show that the "proprietary right," on which the appellant relies, in fact, exists. To establish any such right it would further be

H. L. (E.) necessary for the appellant to get rid of the deed of release
 1920 of December 21, 1889. The release was given so long ago
 O'ROURKE as 1889, and the fraud alleged has yet to be proved. There
 v. is certainly no prima facie case that it can be set aside, and
 DARBISHIRE. so long as the deed stands the appellant cannot be a cestui
 Viscount Finlay, que trust.

(c) The appellant also relied on the proposition that no privilege comes into existence with regard to communications made in order to get advice for the purpose of carrying out a fraud.

This is clear law, and, if such guilty purpose was in the client's mind when he sought the solicitor's advice, professional privilege is out of the question. But it is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the Court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The Court will exercise its discretion, not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purpose of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such a prima facie case as would make it right to treat the claim of professional privilege as unfounded.

A great many cases were cited to your Lordships on the question of professional privilege, but I do not think it is necessary to go through them. *Bullivant's Case* (1) was cited

(1) [1901] A. C. 196.

by the respondents. The question there arose not on an application for discovery, but with regard to a witness who was being examined under a commission from the Courts in New Zealand, and who claimed professional privilege. The House of Lords decided that, in the absence of a definite allegation of fraud, the privilege prevailed. The question, what more is necessary to get rid of the privilege? was not discussed.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE,
Viscount Finlay.

For these reasons I agree with the Court of Appeal in thinking that inspection should, in this case, be refused on the ground of professional privilege, subject to what I shall say as to item 434 later in this judgment.

The Court of Appeal thought that professional privilege was sufficient to dispose of the case, and gave no judgment on the second ground, which was thus stated in para. 4 of the further affidavit :—

“To the best of our knowledge information and belief the said documents Nos. 434 and 436 and (so far as we object to produce the same) 437 either do not in any way relate to the matters in issue in this action or in so far as they do relate to the same relate solely to our case and to the case of our said co-Defendants and not to the case of the Plaintiff and do not in any way tend to support the Plaintiff's case or impeach our own.”

This claim was rejected by Peterson J. on the ground that on perusal by consent of the documents in item 434 for which, amongst others, this privilege had been claimed, he thought that they might tend to support the plaintiff's case to some extent. He therefore declined to give effect to this claim with respect to any documents, as, in his opinion, the defendants' affidavit must have been made under a misconception of the law applicable to this head of privilege or a misapprehension of the effect of the documents (Appendix, pp. 106-7). I agree with the Court of Appeal in thinking that this mistake as to item 434 was not a sufficient reason for treating this claim as unfounded in all cases. This ground of privilege has been elaborately argued before us, and I propose to state the conclusions at which I have arrived.

H. L. (E.) The grounds on which privilege under this head was denied
1920 were :—

- | | |
|--|--|
| <p><u>O'ROURKE</u>
v.
<u>DARBISHIRE.</u>
<u>Viscount Finlay.</u></p> | <p>1. That such privilege is confined to documents which are admissible in evidence.</p> <p>2. That it sufficiently appears in this case that the affidavit in which this privilege is claimed is untrustworthy.</p> |
|--|--|

There is no case confining privilege of this kind to documents which are admissible in evidence, and such a limitation would be inconsistent with the principle on which it rests.

A great many passages were cited from Wigram on Discovery, 2nd ed., 1840, in which the documents, which are the subject of this privilege, are described as "evidences," and it was urged that this showed that the privilege could not be claimed in respect of any document not admissible in evidence. It is, however, a mistake to suppose that "evidences" (an old phrase in English law) necessarily denotes only documents which are admissible in evidence. The principle laid down by Wigram on Discovery (para. 346, p. 264) is that a plaintiff is not entitled to exact from the defendant any discovery exclusively relating to his case, or of the evidence by means of which that case is to be established. It is obvious, as Mr. Tomlin pointed out in his extremely clear and cogent argument, that to exempt from inspection only documents which are admissible in evidence would leave open to inspection many documents which might reveal what the case of the opponent is and the evidence by means of which it is proposed to establish it.

A party is entitled to get inspection of any documents relating to his own case. He is not entitled to see documents relating exclusively to his opponent's case in order that he may prepare means of meeting it or try to discover flaws in it. The whole of the plaintiff's argument on this head seems to me to rest on a misconception of the meaning of the term "evidences" as used in this connection. Of course, in a very great number of cases the documents which have come into question have been title deeds or other documents which are admissible in evidence, but there is an entire absence

of authority to show that the privilege is confined to such documents, and if it were so confined the value of the privilege would be greatly lessened. The affidavit in the present case is in the form which has been in use for a great many years, and your Lordships are now, in effect, asked to say that judges, counsel and solicitors have all failed to appreciate the law on a matter of every-day practice, and that every affidavit which has been made claiming such privilege within the memory of man has been erroneous and insufficient. The proposition put forward on behalf of the appellant on this head seems to me to be entirely novel, erroneous on principle, and destitute of authority.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.
Viscount Finlay.

I think the affidavit in the present case is sufficient, and that if it were necessary to rely on this head of privilege, the defendants have properly claimed it.

Some questions of a special nature have arisen with regard to documents under item 434. These documents consist of:—

1. A case and opinion of counsel taken on behalf of the testator ;
2. A case and opinion of counsel taken by the trustees and executors after the testator's death.

In my opinion the appeal as to these documents should not have been entertained by the Court of Appeal ; the decision of Peterson J. with regard to them was not appealable. The learned judge was invited by the defendants' counsel to inspect these documents, and to say whether they should be produced. He did so, and decided that the plaintiff should see them. An order made under the circumstances was in the nature of an award, not a judgment.

The statement of Peterson J. as to what took place will be found in the appendix at pp. 103-4. He begins by touching on certain legal considerations, and points out that the plaintiff could not claim to inspect the documents under the second head of item 434 as being a cestui que trust. He then says that the plaintiff also rested his claim to inspect on the ground that fraud was charged, and proceeds thus : " Whether this is correct or not I need not consider for the

H. L. (E.) purpose of this part of the case, as in both cases comprised
 1920 in 434 counsel for the defendants invited me to peruse the
 O'ROURKE two cases and opinions, and say whether in my judgment
 v. they ought to be produced. I have done so, and, although
 DARBISHIRE, I do not say that the plaintiff will derive much comfort and
 Viscount Finlay, support from them, in my opinion he ought to have the
 opportunity of seeing them."

There are, of course, many cases in which documents are shown to the judge to give him materials for his judgment and to form one element for his appreciation of the case as a judge. Peterson J. in the passage which I have quoted above expressly states that he considers it unnecessary to determine a legal point which was raised, as he had been invited to say on perusing the documents whether they should be produced. This seems to me to show that he understood that he was invited to decide summarily what should be done as a matter of fairness and not to decide merely on legal considerations. In other words, that he was to arbitrate. His language is quite unequivocal, and his decision would be appealable only if it appeared that he had misunderstood the effect of what passed before him.

A reference to the proceedings as set out in the supplemental appendix shows, I think, that he was quite right.

At the beginning of the discussion as to this item the counsel for the respondents said (p. 16) :—

" Now, my Lord, so far as item 434 is concerned, although our views are that we have good grounds for resisting the production of those—those are the two opinions—we are quite content that your Lordship should see those, and if your Lordship thinks that they ought to be produced then they shall be produced, so that I need not trouble about the principle concerned there."

This to my mind is a clear statement that the respondents would produce the documents if the learned judge, on seeing them, thought they ought to be produced, and on this basis the parties dispensed with discussion of principle. The undertaking that the documents should be produced if the judge, on seeing them, thought that they ought to be

produced, is quite inconsistent with there being any right of appeal from his decision on this point. H. L. (E.)

Later in the argument respondents' counsel said (p. 24) :—
 " If the views I put before your Lordship are sound, I submit that this application must fail except so far as your Lordship thinks it is proper that they should succeed on those two cases. Perhaps I may hand those up. [Same handed to his Lordship.] Those are item 434, and if your Lordship thinks that the notes and memoranda in item 435 are not sufficiently claimed we do not mind their seeing those, but with regard to all the rest I submit that the claim must fail." 1920
O'Rourke
v.
DARBISHIRE.
Viscount Finlay.

Then followed a discussion, in which counsel on both sides took part, as to whether it was desirable that the judge should have the drafts as well as the cases themselves, and in answer to an observation from the other side as to the case submitted to Mr. Theobald (434 (1.)) respondents' counsel said (pp. 24–5):—

" My friend must not take it in that way. If it is going to be disputed I submit there is great dispute about the first. I invite your Lordship to look at them. As a matter of fact your Lordship will see that that was a case to advise, amongst others, the executors nominated personally. Even if my friend relies upon *Russell v. Jackson* (1) that would not necessarily avail him. It would apply to the right which they might have with regard to advice they had taken for themselves personally. I am leaving it in your Lordship's hands. I do not in the least admit that the first case is a clear case."

These passages appear to me to show clearly that the matter was left in his Lordship's hands to determine summarily and not in the ordinary way as a judge, and they are in conformity with the view which he himself took of his functions under the consent of the parties.

At the close of the judgment Peterson J. went through the documents with counsel, stating that the documents to be produced included both cases in item 434. The defendants' counsel then asked for leave to appeal "in regard to such

(1) 9 Hare, 387.

H. L. (E.) parts of your decision as are against us," which Peterson J. granted, nothing being said by anyone as to excepting from the appeal the decision as to item 434. But I do not think that this can alter the effect of what had taken place before the decision. The leave to appeal can operate only on what is appealable. The question is not whether the parties entered into an express agreement that there should be no appeal, but whether they took a course which is inconsistent with the existence of a right to appeal. The fact that general leave to appeal was given may have been due to inadvertence or to the fact that the parties had not present to their minds at the moment the effect in this respect of the course which had been adopted.

I should add that the perfect good faith of counsel in this matter is beyond question. The only point raised is as to the legal effect of what passed on the right to appeal.

In *Bustros v. White* (1) Sir George Jessel M.R., delivering the judgment of the Court of Appeal, said that, where to avoid further affidavits the judge, at the desire of both parties, has looked into the documents himself, and decided whether they should be produced, it is not competent to either party to appeal. The view so expressed by an exceptionally strong Court of Appeal, consisting of eight judges (Jessel M.R., Kelly C.B., James and Mellish L.JJ., Baggallay J.A., Lush and Denman JJ., and Pollock B.), has never—so far as I am aware—been dissented from, and, in my opinion, it is right. It appears to me to be directly applicable to the facts of the present case, in which this course was taken to avoid a legal argument.

I cannot agree with the view expressed by Bankes L.J. (appendix, p. 132, letters A to B) that Peterson J. was asked to look at the documents merely in order that he might see whether the claim of privilege, on the ground that they related only to the defendant's case, was justified. Such a view is in conflict with what took place on the argument, and is contradicted by the terms in which Peterson J. in his judgment gave his view on what had taken place.

(1) 1 Q. B. D. 423, 427.

If the right to inspection of the documents 434 had to be determined by legal considerations applicable in cases where the parties have not consented to cut the knot in the fashion adopted here, I think that as to the documents under head 1 the appellant would succeed, and that he would fail as to those under head 2.

H. L. (E.)
1920
O'Rourke
v.
DARBISHIRE.
Viscount Finlay.

As to 1, the case was submitted to counsel, and his opinion taken in the lifetime of the testator. Both the plaintiff and the defendants claim under the testator—the plaintiff as representing the heir and the next of kin; the defendants as representing his trustees and executors under his will. The foundation of the law of professional privilege is that it is necessary, in order that a person may be able, without danger, to make full disclosure to his professional advisers. It follows that as between him or his representatives and third persons claiming not under the testator but adversely to him, the privilege exists, but, as was pointed out by Turner V.-C. in *Russell v. Jackson* (1), the reason of the privilege does not exist in the case of competition between persons all claiming under the testator, as the disclosure in the latter case can affect no right or interest of the client. The bill in that case was filed by the next of kin against the executors of the deceased, who were also his residuary legatees, and alleged that the gift of the property was made upon a secret trust for the foundation of a school, and that the defendants were trustees for the heir at law and next of kin. (2) The solicitor to the testator, who after his death became solicitor to the executors, was examined under commission, and a motion was made to suppress parts of his deposition on the ground of professional confidence. It was held that the communications between the testator and his solicitor might be read, but that the communications between the executors and the solicitor, after the death of the testator, were privileged. The Vice-Chancellor gives his reasons at length. (3)

Bankes L.J. in his judgment (appendix 125) says,

(1) 9 Hare, 387, 392.

(2) 10 Hare, 204, 207–208.

(3) 9 Hare, 391–3.

H. L. (E.) with reference to the case and opinion in the lifetime of the
 1920 testator: "In my opinion that particular case is covered by
 O'ROURKE the conclusion which Peterson J. arrived at in another part of
 v. his judgment, namely, that a person who claims a document
 DARBISHIRE. under a proprietary right must first of all establish the
 Viscount Finlay. existence of that right, and that not having been done in this
 case, it appears to me that the plaintiff must fail in his claim
 in reference to that first case." This rule has no application
 to the point under discussion. As was explained by
 Turner V.-C. in the case just cited, it is not by "proprietary
 right" that the privilege is negatived, but by the fact that
 as both claim under the testator the ground of this kind
 of privilege fails.

The production of the documents under head 1 could not
 be resisted on the second ground put forward by the defend-
 ants—namely, that they relate only to the defendants' case.
 Peterson J. himself inspected these documents, and came to
 the conclusion that they related in part to the plaintiff's
 case.

With regard to head 2 under 234, professional privilege
 would have prevented any right to inspect.

The parties have, however, taken a course which makes it
 unnecessary to consider these legal questions.

The Court of Appeal reversed the order of Peterson J. in
 toto. By some inadvertence it was not realized that this
 order would exempt from inspection in item 435 "memoranda
 and notes of evidence in actions," and in item 437 "draft
 and fair copies, bill of costs July, 1882, to December, 1886, and
 diaries before January 22, 1887," for which protection had
 not been claimed. These matters should be set right, and
 for the reasons I have given I think that the appeal
 ought to be allowed under item 434, as regards the cases and
 opinions both in the lifetime of the testator and after his
 death; otherwise the appeal should be dismissed.

LORD SUMNER. My Lords, this appeal has raised three
 questions, which, as they were copiously and earnestly argued
 and go to the root of long-settled practice, require a reasoned

solution, though I do not imagine that the answer to them could ever have been in doubt. These questions are :
 (1.) Does a pleaded charge of fraud strip those, against whom it is made, of the ordinary right to rely on professional privilege as a ground for resisting production of documents ? (2.) Is that privilege taken away because the relation of solicitor and client, on which it rests, arises between persons who are trustees and executors, and are, in effect, parties to the action ? (3.) Is the claim to refuse production of documents, on the ground that they do not support his opponent's case but only his own, a claim which is available solely for such documents as the claimant could give in evidence in support of his own case ?

H. L. (E.)
 1920
 O'ROURKE
 v.
 DARBISHIRE.
 Lord Sumner.

(1.) No one doubts that the claim for professional privilege does not apply to documents which have been brought into existence in the course of or in furtherance of a fraud to which both solicitor and client are parties. To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way in which to meet it, is a very different thing from consulting him in order to learn how to plan, execute, or stifle an actual fraud. No one doubts again that you can neither try out the issue in the action on a mere interlocutory proceeding, nor require the claimant to carry the issue raised to a successful trial before he can obtain production of documents which are only relevant to that issue and only sought for the purpose of proving it. I am, however, sure that it is equally clear in principle that no mere allegation of a fraud, even though made in the most approved form of pleading, will suffice in itself to overcome a claim of professional privilege, properly formulated.

North J. in the first of the grounds of decision in *In re Postlethwaite* (1) seems to have held otherwise. I think that he overlooked the fact that, in one of the cases which he relied upon, no fraud appeared on the pleadings at all, and

H. L. (E.) that in the other numerous facts had already been admitted or ascertained. So far, I think that his decision was wrong.

1920
O'Rourke v. DARBISHIRE.
Lord Sumner.

If the dicta of Romer L.J. and of Lord Davey in *Bullivant's Case* (1) are to be read as supporting such a view, I think they ought not to be followed. As I read the opinion of Lord Halsbury, he clearly holds that a prima facie case must be "made out," without purporting to define in what "mode" this is to be done, and without sanctioning a mere pleaded allegation as sufficient. The right of the one party to have discovery and inspection and the right of the other, within certain areas, to be protected from inspection, are parallel rights; in itself neither is paramount over the other. It is therefore the business of the party claiming production to meet a properly framed claim of professional privilege by showing that the privilege does not attach because it is being asserted for documents which were brought into existence in furtherance of a fraud, and he can only do this by establishing a prima facie case of fraud in fact. Evidence, admission, inference from circumstances which are common ground, or "what not," as Lord Halsbury says, may serve for this purpose. I do not pretend to define what material may and what may not be used. The imperfections of his pleadings or the dubious character of his procedure in the action may militate against the claimant's case. The fact that a motion to strike out his pleading has been made and has failed, does not establish that he has a sufficient prima facie case for this purpose. The stage in the action is only an interlocutory one, and the materials must be weighed, such as they are, without the apparatus of a formal trial of an issue. On such materials the Court must judge whether the claim of privilege is displaced or not.

This is, as I understand it, the view taken by the Court of Appeal, though expressed in somewhat different language. It is not my business even to form any opinion now as to the plaintiff's prospects at the trial, but I see no ground for thinking that on the material before it, the Court of Appeal was not justified in holding that no sufficient foundation

(1) [1900] 2 Q. B. 163, 168; [1901] A. C. 196, 203.

had been laid for setting aside the respondents' claim of professional privilege. H. L. (E.)

(2.) The necessity, which has sometimes been said to be the foundation for the claim of professional privilege, is not the necessity for confiding in the particular solicitor consulted, but the necessity for letting a litigant confide in some solicitor. It is equally obvious that this principle involves allowing the litigant to choose his own solicitor, and to consult the person in whom he feels confidence. To limit the persons among whom he can choose might be to deny him a choice. To say that if he chooses to consult a co-executor he does so on the terms that their written communications will be open to his opponent, so penalises that particular choice, that in effect it is a prohibition. For reasons stated later, I say nothing of the special case when solicitor and client are executors of a will, under which the party claiming production is a beneficiary, but I do not wish to be understood as accepting the appellant's argument, which I think it irrelevant at present to discuss.

(3.) No case has been cited which decides that the right to refuse production of relevant documents, on the ground that they only support the possessor's case, is limited to "evidences" of his case, in the sense that they are such as could be put in evidence by him and form part of his title. Before the Judicature Acts many cases were decided on claims to refuse production of documents which their possessor might have put in evidence, and none are forthcoming, it seems, in which the documents could not have been so used. The two cases which were said to have decided the point—*Knight v. Marquess of Waterford* (1) and *Hey v. De la Hey* (2)—turn out on examination to be decisions on other grounds. Very little can be inferred from such a condition of the reported authorities. It may be accidental. In any case the point turns on different considerations. The orders and rules, made under the statutory authority of the Judicature Acts, are the code which is paramount in matters which they regulate. The same word "relate" is used in them in

1920

O'ROURKE
v.
DARBISHIRE.
Lord Sumner.

(1) 2 Y. & C. Ex. 22.

(2) [1886] W. N. 101.

H. L. (E.) connection with the obligation to make discovery by affidavit
 1920 and with the right to refuse production on the specified ground
 O'ROURKE in question. In terms neither is limited; and relevancy, and
 v. that alone, is the test. In substance, that must be so as to
 DARBISHIRE. discovery; and no reason has been suggested why it should
 Lord Sumner. not equally be so as to privilege from production. For
 many years this has been regarded as settled practice. The
 contrary would work injustice. I think the appellant's
 contention fails.

As to the questions arising upon item 434, the two cases for the opinion of counsel and the opinions of counsel thereon, I am not disposed to allow the appeal. If the documents were submitted to the learned judge in order that he might decide once for all whether they should be produced or not, his decision could not be appealed: *Bustros v. White* (1); but the reason for this must be that both parties have so intended. The joint request of both parties, that the learned judge should inspect the documents for himself, would in itself raise a presumption that the intention was to submit them for his final decision, but the special language used may negative that. Contrary to the respondents' contention I think the language used in the present case would not in itself negative that presumption, though it is true that, after the judgment of Peterson J. was given, counsel for the now respondents said, "Will your Lordship give us leave to appeal in regard to such parts of your decision as are against us?" which included these particular documents, and leave was given, and at the request of the other side was made "mutual." The case, however, goes further. If the learned judge's decision is unappealable, it is because the parties have agreed that it should be so; and here this is in dispute. Mr. Tomlin says that whatever words he used, this never was his meaning. The agreement, whatever it was, never was reduced into writing and signed, and in themselves the words are susceptible of more than one interpretation. It has not been contended for the appellant that, by accepting Mr. Tomlin's language in the wider sense, his position has

in any way been changed on the faith of the words being so intended and understood, and the question, therefore, is whether there was any consensus animorum between counsel, if the decision Mr. Tomlin asked for was meant to be appealable and the decision Mr. Hughes assented to take was understood to be without appeal.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.
Lord Sumner.

This controversy has been raised before the Court of Appeal, and in substance decided. Such a case must be exceptional, and I think must be rare, and must depend mainly upon the statements of counsel. It is hardly a matter suitable for appeal to your Lordships' House, and I see no sufficient reason for interfering with the determination of it at which the Court of Appeal arrived.

There is a further point as to the opinion of counsel, No. 1 of No. 434. It was taken in the lifetime of the testator, and, though the defendants' first affidavit covers it by the description "Cases and Instructions to Counsel to advise the Executors of Sir Joseph Whitworth as to his Will and Codicils and Counsel's opinion and notes thereon," their second affidavit shows that it consisted of communications "between the Testator and his Counsel," and only the second is said to have been between counsel and the executors. The Lords Justices examined the documents in the first item, as Peterson J. had done. They agree with Peterson J. that they might be used to support the plaintiff's case, and one of the grounds, on which protection was claimed, fails accordingly, but they go on to say that the claim of professional privilege covers them. This is the claim of the client, and, if the testator alone was the client, I do not quite see how the defendants could set up professional privilege. It may be, however, that the proposed executors and legatees joined in taking this opinion. I have not seen the papers. Peterson J. rejected the claim to refuse production, partly on what has been called the "proprietary" ground, partly because he thought that no professional privilege can be claimed between co-executors. He does not negative the possibility that the proposed executors were also Mr. Theobald's clients in the matter, and, if so, the view of

H. L. (E.) Bankes and Warrington L.JJ. would be explained. I am
1920 not satisfied that your Lordships should interfere. It is a
O'ROURKE question of particular documents, not of general principle.
v.
DARBISHIRE. My Lords, the remaining matters relate to the application
Lord Sumner. of well-settled rules to the particular facts of this case in a
mere interlocutory proceeding. I agree that the appellant
has no claim to see these documents, including the first of
the two cases for opinion in No. 434, except under the law
relating to discovery, because, while the releases obtained
by Whitworth's executors stand, to say nothing of the fourth
codicil, he cannot claim to see them as being his documents
in any sense. I am satisfied that, if the two letters, dated
December 30, 1895, and January 26, 1896, have been wrongly
appreciated by the respondents in relation to discovery (which
I by no means decide), their error has not been such as to
cast doubt on their general understanding or observance
of their obligations, or to vitiate their claims to withhold
disclosure in respect of other documents.

In drawing up the order of the Court of Appeal an error
has been made as to which I think the respondents have been
to blame, and might well have been made liable in costs to
some extent, but, as two of your Lordships think differently,
as the appellant has already seen some of the documents,
which the order erroneously dealt with, and as counsel has
undertaken for the production of the others when requested,
and as the order, being interlocutory, is only of importance
as affecting production, I acquiesce in their views.

I agree that the appeal should be dismissed with costs.

LORD PARMOOR. My Lords, Sir Joseph Whitworth died
in January, 1887, seised or possessed of real or personal estate
of great value. The appellant is the legal personal represen-
tative of Fanny Uniacke, who was the heiress at law, and
one of the two next of kin of the testator. The respondents
are the respective legal personal representatives of the executors
of Sir Joseph Whitworth. The action related to the estate
and testamentary dispositions of Sir Joseph Whitworth, and
the plaintiff charged that there was either a secret trust, or

that the executors took the residuary real and personal estate for their own absolute use and benefit, and that the form in which the testamentary disposition was arranged or settled was a mere fraudulent device, or scheme, for appropriating to the use of the executors a very large portion of the estate of the testator. It is not necessary to determine how far the action is well constituted, so long as the probate of the will and codicils of the testator have not been recalled. The appeal must be determined on the pleadings as they stand. The question is whether an order for production of the documents contained in the second part of the schedule of documents should be made. These documents relate to the matters in question in the action; but their production is refused, on the ground that they are privileged either as being documents which consist solely of professional communications of a confidential nature, which for the purpose of obtaining legal advice have passed between the executors and their solicitors, or on the ground that the documents either do not in any way relate to the matters in issue in this action, or, in so far as they do relate, relate solely to the case of the defendants, and not to the case of the plaintiff; and do not in any way tend to support the plaintiff's case, or impeach that of the defendants. In form, this privilege is sufficiently claimed, but it was urged on behalf of the appellant, that over a long period of years the meaning of the claim for privilege, on the ground that the documents related exclusively to the case of the defendants, had been misunderstood, and that the privilege only extended to such documents as might be admissible in evidence to support the defendant's case. The claim for privilege was disputed by the appellant on various grounds, and the question for determination is whether, and how far, these objections raised on behalf of the appellant can be maintained.

A cestui que trust, in an action against his trustees, is generally entitled to the production for inspection of all documents relating to the affairs of the trust. It is not material for the present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.
Lord Parmoor.

H. L. (E.) trust, or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission, or the establishment, of the status on which the right is based. I agree in the view expressed by Peterson J., that the rule as to the right of a cestui que trust to the production of trust documents for inspection does not apply when the question to be tried in the action is whether the plaintiff is a cestui que trust or not. In the present case not only is the status of the appellant as a cestui que trust disputed, but in addition a release was executed, which, unless it can be set aside, is a bar to his claim. It is not necessary to consider on what grounds the release is attacked, but it is obvious that there may be formidable difficulties in the way of the appellant under this head. The attention of your Lordships was directed to various authorities, but it is sufficient to refer to *Wynne v. Humberston* (1) and to *Compton v. Earl Grey*. (2)

The second point raised, on behalf of the appellant, was based on the proposition that professional privilege does not apply to a case in which a solicitor, who is a trustee, has acted as professional adviser to himself and his co-trustees, who are co-defendants in the action. It was not contended that this principle would apply where professional advice was taken on a personal matter affecting one of the trustees; but in the present case the affidavit of documents shows that the privilege is claimed in respect of documents which do relate to the trust matters in question. It is notorious that, in many cases, solicitors are appointed as co-trustees with full power to act as solicitors in their professional capacity in relation to trust matters, and to make in respect thereof ordinary professional charges.

As a matter of principle, it is difficult to understand why confidential communications made to a solicitor, in his professional capacity, should cease to be privileged because such solicitor has been appointed as a co-trustee by the testator with a power to act as solicitor in the affairs of the trust. There is no less necessity in such a case to protect, in the interests of justice, such a disclosure of the facts and

(1) 27 Beav. 421.

(2) 1 Y. & J. 154.

conditions as is required to obtain professional and confidential advice. To hold otherwise would deprive a lay trustee of a privilege which would attach to communications made to an outside solicitor, with the result that it might be necessary for him to take such advice in preference to that of the solicitor especially cognizant of the trust affairs. It is not a relevant consideration that communications between co-defendants, none of whom are solicitors, are not privileged. In the argument on behalf of the appellant, reliance was placed on the case of *In re Postlethwaite*. (1) In this case the plaintiff, who sought the production of documents, was undoubtedly a beneficiary. Further, a charge was made in the statement of claim that the purchase in the name of a third person was a fraudulent device, intended to cover up a real purchase by one of the two trustees. As to this it is not necessary to say more, since the decision turned on the special circumstances of the case. I agree with Warrington L.J. that the claim to have the documents produced was placed on the proprietary right of the plaintiff, and not on the ground that the claim of privilege was destroyed owing to the fact that the solicitor consulted was also a co-trustee. If however North J.'s judgment can be extended, to cover the claim made by the plaintiff in this case, the principle is stated in too wide terms, and cannot be maintained.

The third point relied on by the appellant, as an answer to the claim of professional privilege, is that the present case comes within the principle that such privilege does not attach where a fraud has been concocted between a solicitor and his client, or where advice has been given to a client by a solicitor in order to enable him to carry through a fraudulent transaction. If the present case can be brought within this principle, there will be no professional privilege, since it is no part of the professional duty of a solicitor either to take part in the concoction of fraud, or to advise his client how to carry through a fraud. Transactions and communications for such purposes cannot be said to pass in professional confidence in the course of professional employment. Such

(1) 35 Ch. D. 722.

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.
Lord Parmoor.

H. L. (E.) 1920
 O'Rourke v. DARBISHIRE.
 Lord Parmoor.

a case must be differentiated from a case in which, after the commission of a crime, or in order to meet a charge of fraud made against him in a civil action, a client consults a solicitor in his professional capacity, employing him in order to obtain the benefit of his confidential advice and assistance. The appellant does make in his pleadings a charge that a fraud has been concocted between the solicitor and client; and the question which arises is, whether such a *prima facie* case of a definite character has in some way been brought to the notice of the Court so as to justify the Court in holding that the appellant has the ordinary right of production of documents relating to his case, the defendants in respect of such production not bringing themselves within the protection of professional privilege.

It may be that the allegations in the statement of claim, apart from any other source of information, are sufficiently explicit to negative the claim of professional privilege, but the proposition that the mere pleading of fraud is in itself sufficient necessarily to defeat the claim of professional privilege cannot be maintained. To admit this proposition would be equivalent to saying that the claim to protection for professional privilege, a claim founded in the interest of the proper administration of justice, could be defeated by the skill of a pleader and the use of technical language whenever it was desired to obtain an inspection of documents, otherwise privileged, in the expectation of the discovery by this means of information to support a charge of fraud. On the other hand, in order to obtain the production of documents, it is certainly not necessary to prove the existence of fraud, and such an obligation might result in the non-production of documents, which in a particular instance might constitute the only evidence on which the plaintiff relied to establish his case.

In the case *Bullivant v. Att.-Gen. for Victoria* (1), Lord Halsbury, in advising the House, says: "The line which the Courts have hitherto taken, and I hope will preserve, is this—that in order to displace the *prima facie* right of silence by

(1) [1901] A. C. 196, 201.

a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." This passage relates to the giving of evidence before commissioners, but there is no difference in the principle applicable in such a case, and the principle applicable to the production of documents on an interlocutory application. Whether the circumstances brought to the notice of the Court in a particular case are sufficiently explicit to establish a *prima facie* case of definite fraud, either by allegation, affidavit, or in some other way, will depend on the special facts in each case: *Reg. v. Cox*. (1) But something more is required than mere pleading, or than mere surmise and conjecture. If in the present appeal there is disclosed a real *prima facie* case of definite fraud, this must be found in the allegations contained in the pleadings and particulars, seeing that there has been no affidavit, and no information from any other source. In the statement of claim fraud is alleged, as an alternative to a secret trust, on the ground that the form in which the testamentary disposition of the testator was settled or arranged by Christie and Darbishire was a mere fraudulent device or scheme for appropriating, to the use of Whitworth's executors, a very large portion of the testator's estate. This allegation is not supported by the statement of any facts which might give positiveness or distinctness to the charge, but rests on nothing more than pleading, or mere surmise and conjecture. In my opinion this is insufficient, either to support the right of the appellant to inspection, or to defeat the claim of the defendants to the protection of professional privilege, and I agree with the decision arrived at by the Court of Appeal under this head. I desire to add that the refusal of the Court to strike out the statement of claim, on the application of the defendants, does not of itself establish any case of *prima facie* fraud, or make the case other than one of mere surmise and conjecture.

The next question for consideration is whether the claim of

H. L. (E.) privilege has been sufficiently made in the statement that the documents relate solely to the case of the defendants, and not to the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach that of the defendants. It was argued on behalf of the plaintiff that to support the claim for privilege the documents must be such as might be admissible in evidence to support the case of the defendants. My Lords, I think that this is an impossible contention, and that to assent to it would be to admit a proposition which is not supportable, either in principle or by authority. The affidavit for discovery of documents includes all documents in the possession and power of the deponent which relate to the matter in question, and clearly is not limited only to such documents as may be admissible in evidence. Such a limitation would destroy in great part the value of discovery ; but if documents must be disclosed in the affidavit of documents independently of whether they are admissible in evidence or not, it is difficult to suggest any reason why the claim of privilege against production should not cover the same documents. For instance, the copy of a document, although not in itself admissible in evidence, comes within the same category as the original document, in so far as concerns the privilege of production, but if there was an obligation to produce it, it would give the same information as the document itself, though such a document would itself be protected on the ground that it is admissible in evidence. This novel doctrine assumes that the word "relate" can be read as synonymous to "admissible in evidence," an assumption for which there is no warrant.

The attention of your Lordships was called to a number of passages in the works of Hare and Sir J. Wigram. It is not necessary to consider these passages in detail, but I can find none which support the proposition that there is no privilege attaching to documents which relate exclusively to the case of one party to an action, unless such documents may be admissible in evidence in support of his case. To quote one passage to the contrary from Sir J. Wigram's book, p. 264 : "A Plaintiff is not entitled to exact from the Defendant any

discovery exclusively relating to his case, or of the evidence by means of which that case is to be established." H. L. (E.) 1920

Numerous authorities were quoted to your Lordships in the argument on behalf of the plaintiff, but there is no case which holds that a document, not admissible in evidence, is outside the claim of privilege, although such document relates solely to the opponent's case and not to the case of the party seeking production. *Bewicke v. Graham* (1) is a direct authority that the claim of privilege is sufficiently made in a form similar to that used in the present case. Compare *Budden v. Wilkinson*. (2) O'Rourke v. DARBISHIRE. Lord PARMOOR.

The only cases which could present any difficulty are *Knight v. Marquess of Waterford* (3) and *Hey v. De la Hey*. (4) I have had the advantage of reading the opinion expressed by Lord Wrenbury on these cases, and desire to express my entire concurrence. It was further argued that the affidavit filed on behalf of the defendants was, on its face, untrustworthy. This argument raises no question of principle, but there appears to be no adequate reason for displacing the oath of Mr. Darbshire. The test to be applied is well stated in the case of *Roberts v. Oppenheim* (5) by Cotton L.J. : " We ought not to speculate in order to get rid of the protection claimed, and . . . we ought to accept the affidavit as conclusive unless the Court can see distinctly that the oath of the party cannot be relied on."

In the course of his exhaustive argument Mr. Hughes handed in for the convenience of your Lordships a chart of the documents. Documents 434 (1.), if privileged from production, are only so privileged as documents which relate entirely to the case of the defendants. Documents 434 (2.) may be privileged either under the claim of professional privilege or as documents which relate entirely to the case of the defendants. These documents were inspected by the learned judge, and it was argued that he acted as arbitrator between the parties, with their consent, and that no appeal

(1) 7 Q. B. D. 400.

(4) [1886] W. N. 101.

(2) [1893] 2 Q. B. 432.

(5) 26 Ch. D. 724, 734.

(3) 2 Y. & C. Ex. 22, 41.

H. L. (E.) would lie against the order for production. The matter is not free from doubt, and there was a difference in the understanding of the two counsel, both of whom, with evident sincerity, referred to what passed before the learned judge at the trial. It is sufficient to say that I am not prepared to differ from the conclusion of the Court of Appeal. The order of the Court of Appeal includes documents to the production of which the counsel for the defendants agreed in the hearing before Peterson J., and on which no appeal was opened in the Court of Appeal, and documents for which no privilege was claimed in the affidavit of Mr. Darbishire. The order should be that the respondents undertake to produce these documents and that the appeal should be dismissed with costs.

1920
O'ROURKE
v.
DARBISHIRE.
Lord Parmoor.

LORD WRENBURY. My Lords, as legal personal representative of the heiress at law and one of the next of kin of the testator, the plaintiff claims to be entitled to a certain part of the testator's estate. His claim is made not under the will, but upon the footing of an intestacy as regards so much of the estate as upon the face of the will was given to the three executors absolutely in equal third shares. If he is right, the executors are trustees for him, and none the less by reason of the fact that he claims not under a gift contained in the will but by reason of there being, as he says, no effectual beneficial gift there contained. The executors are trustees for whosoever is beneficially entitled to the testator's property.

If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone

else's documents. The proprietary right is a right to access to documents which are your own. No question of professional privilege arises in such a case. Documents containing professional advice taken by the executors as trustees contain advice taken by trustees for their cestuis que trust, and the beneficiaries are entitled to see them because they are beneficiaries. The first case in *Talbot v. Marshfield* (1) is an instance.

H. L. (E.)
1920
O'Rourke
v.
DARBISHIRE.
Lord Wrenbury.

But this plaintiff cannot as matters stand say that he is a beneficiary. That is the very question to be determined in the litigation. Before he can establish that he is a cestui que trust he has two difficulties to surmount. The one is, that he must establish that there is property undisposed of by the will. The will, on its face, purports to dispose absolutely of the whole. He says there was a secret trust, that this trust failed, and that the funds in the hands of the executors are, as between them and him, bound by a trust which he can enforce—namely, a trust for those who would be entitled if the secret trust failed, as he says it did. One question at issue in the action is whether there was any such secret trust or whether the executors are right in saying, as they do, that the property was given absolutely to them in equal third shares. The other difficulty is that Mrs. Uniacke (as whose legal personal representative he sues) executed on December 21, 1889, a release which laid the above question at rest in a manner fatal to his claim, and unless and until he succeeds in setting that release aside he has no claim to any part of the estate. That release is thirty years old; the parties to it are dead. Evidence has thus been lost, and there is no presumption that it will be, and no prima facie case made to lead to the belief that it will be set aside.

In this state of facts the plaintiff cannot assert a proprietary right to the documents on the footing that they are his, and cannot enforce inspection on that ground. If authority be needed *Wynne v. Humberston* (2) is clear authority upon the point.

This being so, the plaintiff must succeed, if at all, upon the

(1) 2 Dr. & Sm. 549.

(2) 27 Beav. 421.

H. L. (E.) ground that he has a right to discovery of the documents, 1920 a right to inspect them, notwithstanding that they are not his, O'ROURKE because they relate to the matters in question in the action. v. DARBISHIRE. Prima facie he is entitled to inspection on that ground. It Lord Wrenbury. is for the defendants to show valid grounds for protecting them from inspection. The grounds upon which they resist inspection have to be considered under three heads.

The first is professional privilege. As to this the plaintiff says: There is no professional privilege, because the solicitor who was consulted was himself one of the trustees. My Lords, in my opinion this contention cannot be supported. Professional privilege is based upon public policy. It is considered that for purposes of justice a client ought to be in a position to go to his solicitor and be wholly untrammelled in speaking to him without any reserve, that he ought to be in a position to obtain his advice, and that all this should be done under the veil of professional confidence. Lord Brougham in *Greenough v. Gaskell* (1) gives the true foundation of the doctrine. I see no ground of principle why this should be affected by the fact that the solicitor is a co-trustee with the client. The appellant says that the solicitor trustee is bound to answer the cestui que trust as to any matter relating to the trust. So he is, unless he is constrained by some superior duty. To say that professional confidence is not a superior duty is to beg the question. If the trustee who is not solicitor is asked the question he is entitled to claim privilege, for otherwise public policy would be defeated in compelling him to answer. His privilege cannot lapse because the solicitor whom he consults owes a duty to another. And if the trustee who is solicitor is asked he is entitled to reply that he is constrained by the privilege of his client, which he is not entitled to break. But, says the appellant, the trustee should have gone to some other solicitor. In the present case the testator in fact by his first codicil authorized the trustee solicitor to act as solicitor to the trust. But I do not rely on this as differentiating the case. There is nothing wrong in employing a co-trustee as solicitor. If privilege

(1) (1833) 1 My. & K. 98.

would have existed if the solicitor had not been trustee, I cannot see anything that will destroy privilege when he is. Other considerations would arise if the case made were that the trustees were conspiring to defraud the trust, for it is no part of a solicitor's duty to advise his client how to commit a fraud. This is a separate ground, with which I shall deal presently.

H. L. (E.)
1920
O'Rourke
v.
DARBISHIRE.
Lord Wrenbury.

The appellant relies on *In re Postlethwaite*. (1) The case differs from the present in material particulars. The plaintiff there was a cestui que trust; there was no question about that. He had a proprietary right, and had that right to see every document in the trustees' hands which had been obtained by them as trustees. Protection could only be claimed, and it was claimed, on the ground that the documents came into existence on an occasion when the lay trustee was consulting the solicitor trustee, not as solicitor to the trust, but as his private solicitor. The illustration given by North J. in *In re Postlethwaite* (2) upon his second ground is far from convincing. Not everything that is said at a professional interview between solicitor and client is privileged, any more than the whole of a letter, some part of which contains professional advice and other part bears no such character, is privileged.

In my opinion this plaintiff, who cannot at present affirm that he is, or even say that he has established a prima facie case that he is, a cestui que trust, cannot succeed on the ground of proprietary right, and cannot, on the mere ground that the solicitor was a co-trustee, exclude the privilege if, in other respects, it is rightly claimed.

The second question for consideration is whether privilege has rightly been claimed by the defendants on the ground that the documents relate solely to the defendants' case and not to the case of the plaintiff, and do not tend to support the plaintiff's case, and do not contain anything impeaching the defendants' case. Upon this the plaintiff has advanced a contention which is startling to me, that privilege under those words can only be claimed for documents which the

(1) 35 Ch. D. 722.

(2) 35 Ch. D. 726-7.

H. L. (E.) defendants could put in evidence at the trial. The words are
1920 to be understood, he says, as if they ran "relate solely to and
O'ROURKE could be used by the defendants in support of their case."
v. My first observation upon this is that these are not the words,
DARBISHIRE. and it would have been easy to require these words if this
Lord Wrenbury, were the meaning. The second observation is that this cannot
be the meaning of the words, and for this reason. The verb
used is "relate." The same word is used in defining the
whole class of the documents as to which the affidavit of
documents is to be made. They are all the documents which
"relate" to the matters in question in the action, whether
they be capable of being given in evidence or not. The
documents to which the affidavit is to extend are not confined
to documents which somebody could use in evidence. The
same meaning must be attributed to the word in the language
under consideration.

Further, it is obvious that there are many documents which the defendants could not put in evidence which they would be entitled to protect from inspection. The defendant's private diary, which may be most useful to him in enabling him to determine and speak to a relevant date, is a document which he cannot put in evidence, but the plaintiff could not get inspection of it. So, if the defendant has made a copy of a deed relating only to his own title, or has made for his own use a translation of a document in Norman French, or has prepared for his own guidance a note or abstract of what he is in a position to say in evidence, he could not put the copy or translation or note in evidence (unless as regards the copy deed or the translation the original had been lost, and he was entitled to use secondary evidence), but the plaintiff could not obtain discovery of such documents as these so as to acquaint himself with the contents of the deed or the nature of the proposed evidence. Numerous authorities have been cited by the appellant in which the word "evidences" has been used, and in which documents which were "evidences" in the sense that the defendant could use them as evidence have been protected. But no cases have been cited in which an order has been made that documents which were not

“evidences” be discovered on the ground that although H. L. (E.) privilege was appropriately claimed in all other respects, 1920 the opposite party was entitled on that ground to inspect O’ROURKE v. DARBISHIRE. In *Knight v. Marquess of Waterford* (1) and *Hey v. De la Hey*. (2) Neither of these cases goes this length. Lord Wrenbury. In *Knight v. Marquess of Waterford* (1) the map, it was said, “may possibly be evidence of the extent of the manor, and may therefore throw some light on the plaintiff’s claims” (3); the Court rolls were “a collection of Court rolls which he holds for the benefit of others,” and as to the answer and the letters, reasons are assigned which support production on grounds of special matters, not grounds of general application. In *Hey v. De la Hey* (2) the defendants, by their affidavit, claimed that the documents “were intended to be or might be used by the defendants in evidence,” and the Court ordered production on the ground that they could not be so used. They were letters between co-defendants, and the ground was obviously a good one. The documents were discoverable unless there were some other ground of privilege on which the affidavit and the report are alike silent. To found anything upon a report of this kind in the Weekly Notes is, in my opinion, impossible.

Upon this point *Bewicke v. Graham* (4) is important, and establishes, I think, the law as I understand it to be: see *Bray on Discovery* (1885), p. 485.

The defendants’ claim of privilege under this second head is, in my opinion, good.

Then the scene changes, and the plaintiff says: Granted all this, it remains that these documents are discoverable because I allege a case of fraud. Here he relies principally upon *Reg. v. Bullivant* (5), and, in particular, upon the words of Romer L.J.: “the claim of privilege is unavailing in cases where fraud or illegality is alleged, and, the existence of that fraud or illegality being in issue, the documents are relevant to that issue.” To cite these words and rely upon them as

(1) 2 Y. & C. Ex. 22.

(2) [1886] W. N. 101.

(3) 2 Y. & C. Ex. 41.

(4) 7 Q. B. D. 400.

(5) [1900] 2 Q. B. 163, 168;
[1901] A. C. 196.

H. L. (E.) laying down a general principle apart from the context and
 1920 the facts with reference to which they were uttered, is, of
 O'ROURKE course, quite inadmissible. For instance, if the affidavit
 v. showed that the documents related to professional advice
 ARBISHIRE. sought for and obtained by the party in anticipation of liti-
 Lord Wrenbury. gation or under the stress of litigation in respect of the alleged
 fraud, no one could dispute that they were protected. The
 Lord Justice's words must, of course, be qualified accordingly.
 Not every document relevant to the issue of fraud but
 documents which are not upon some other ground privileged,
 are exposed to production. For the present purpose it is
 sufficiently accurate to say that documents relating to the
 conception and carrying out of the alleged fraud are not,
 but documents arising in professional confidence as to defence
 against the alleged fraud are protected.

Further, as regards documents which, upon the principle
 above stated, are open to inspection the plaintiff must, in
 asking for them, go at any rate so far as to satisfy the Court
 that his allegations of fraud are not merely the bold assertions
 of a reckless pleader, but are such as to be regarded seriously
 as constituting *prima facie* a case of fraud resting on solid
 grounds. Here, again, a sentence from Lord Davey's opinion
 in *Bullivant* (1) is to be read carefully, and its meaning to be
 ascertained from the circumstances in which it was uttered.
 "I do not dissent," he says, "from what was said by
 Mr. Haldane, that it must be assumed for the present
 purpose that the case stated in the pleadings is true for the
 purpose of testing the right to production."

In *Bullivant* (2) an information had been filed in the Supreme
 Court of Victoria, and a commission had been issued to take
 the evidence of a witness in this country. Upon his exami-
 nation he was called upon to produce a certain book. The
 question in the action was whether the defendant was
 "evading" a statute. In the Court of Appeal the case was
 decided upon the footing that the allegations of intent to
 evade were allegations of fraud. The House of Lords reversed

(1) [1901] A. C. 203.

(2) [1900] 2 Q. B. 163; [1901]
 A. C. 196.

the Court of Appeal on the ground that evasion of a statute is not, in one sense of the word, a fraud, and that there was no sufficient allegation of fraud. Upon this state of facts Lord Davey's words obviously fall far short of the meaning that if fraud be alleged the Court must assume that it is true. Lord Halsbury's words are that before professional "confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." (1) If I may venture to express this in my own words I should say that to obtain discovery on the ground of fraud the plaintiff must show to the satisfaction of the Court good ground for saying that *prima facie* a state of things exists which, if not displaced at the trial, will support a charge of fraud. This may be done in various ways—admissions on the pleadings of facts which go to show fraud—affidavits in some interlocutory proceedings which go to show fraud—possibly even without admission or affidavit allegations of facts which, if not disputed or met by other facts, would lead a reasonable person to see, at any rate, a strong probability that there was fraud, may be taken by the Court to be sufficient. Every case must be decided on its merits: *Reg. v. Cox*. (2) The mere use of the word "fraud" or the prefix of the adverb "fraudulently" from time to time throughout the narrative will not suffice.

The Court of Appeal found in the present case no sufficient allegation of a case of fraud. I agree. Para. 11 of the statement of claim "charges" that the testator communicated to his executors a secret trust, which was either too indefinite or was invalid by reason of the Mortmain Acts. Suppose he did. Who was defrauded by his doing so? Not the testator, for *ex hypothesi* it was he who made the communication; he was a party to it, and intended it. Para. 12 "charges" that the form in which the testamentary dispositions was (sic) arranged or settled by two of the executors was a fraudulent device for appropriating to the executors a part of the testator's estate, and that the third executor was a party to it. This is a "charge" of the existence of a "scheme," not the allegation of any facts which tend *prima facie* to support a

H. L. (E.)
1920
O'ROURKE
v.
DARBISHIRE.
Lord Wrenbury.

(1) [1901] A. C. 201.

(2) 14 Q. B. D. 153, 175.

H. L. (E.) case of fraud. And there is nothing whatever in the way of
 1920 admission or evidence or circumstances of suspicion to found
 O'ROURKE a probability or a prima facie case of fraud. This ground
 v. therefore in my judgment fails.
 DARBISHIRE.

Lord Wrenbury. It follows that the appeal wholly fails subject to something which must be said as to some particular documents. Para. 5 of the further affidavit of documents had stated as regards part of No. 437: "For these we do not claim any privilege, and we do not object to produce the same." Nevertheless, the order under appeal protects them. The Court of Appeal say nothing about the paragraph of the affidavit to which I have referred, and obviously had forgotten it. To protect them by this order is a mere slip. In fact some of these documents were produced at the plaintiff's request some weeks ago. These are the documents 437 (1.).

There is again a slip as regards the documents 435 (2.). Peterson J. had ordered production. The defendants had appealed against that order, but did not open their appeal. The Court of Appeal overlooked the fact.

As regards the documents 434 (1.) and (2.), these were inspected by the judge with the consent of the parties. It is a matter of everyday occurrence that to save time and dispute the parties say, "Let the judge see the document," meaning that he is to look at it as further material upon which to base his judicial decision whether it is privileged or not. No one in such a case intends to make the judge an arbitrator, and I am satisfied that the parties in the present case did not so intend. As to the right decision as regards these the matter stands thus:—

No. 434 (1.) is a case and opinion taken in the testator's lifetime; 434 (2.) is a case and opinion taken after his death. In my opinion both of these are protected, and the order under appeal is right. 434 (2.) is protected by professional privilege—434 (1.) is not: *Russell v. Jackson*. (1) 434 (1.) is, however, protected upon the grounds stated by Lord Sumner in his judgment, with which I agree.

The defendants giving an undertaking to produce the

documents 435 (2.) and 437 (1.), as to which the order under H. L. (E.)
 appeal is obviously wrong by a slip, this appeal should, in 1920
 my judgment, be dismissed with costs.

O'ROURKE
 v.
 DARBISHIRE.
 Lord Wrenbury.

Order of the Court of Appeal affirmed, the respondents giving an undertaking to produce —(1.) the Memoranda and Minutes of Evidence mentioned under item No. 435 in the Schedule to the affidavit of O. V. Darbshire and A. H. Worthington filed May 1, 1917; (2.) the entries in the diaries of R. D. Darbshire from 1882 down to January 21, 1887, inclusive; (3.) the draft and fair copy Bill of Costs of Darbshire and Tatham against Sir Joseph Whitworth from July, 1882, to January 21, 1887, inclusive, mentioned under item No. 43 in the Schedules to the respective affidavits of the said O. V. Darbshire and A. H. Worthington filed respectively May 1, 1917, and May 3, 1918; and appeal dismissed with costs.

Lords' Journals, February 26, 1920.

Solicitors for the appellant: *Edmond O'Connor & Co.*

Solicitors for the respondents: *Pennington & Son, for Tatham, Worthington & Co., Manchester.*

J. C.*

[PRIVY COUNCIL.]

1919
—
Dec. 18.

ISABELLA TAYLOR APPELLANT ;

AND

DAVIES AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO,
APPELLATE DIVISION.*Canada (Ontario)—Limitation of Action—Trustee—Fiduciary Relationship—
Retaining Trust Property—Limitations Act (R. S. Ont., 1914, c. 75),
ss. 5, 47.*

By s. 47 of the Limitations Act (R. S. Ont., 1914, c. 75) a trustee against whom an action is brought can avail himself of any statute of limitations as though he was not a trustee, except in, amongst other cases, that of a claim "to recover trust property, or the proceeds thereof, still retained by the trustee"; a "trustee" in the section is to include "a trustee whose trust arises by construction or implication of law, as well as an express trustee."

Under a deed of assignment for the benefit of creditors the first respondent, a mortgagee of land part of the property assigned, was appointed one of the inspectors required by s. 17 of R. S. Ont., 1897, c. 147. In 1902 the assignee conveyed to the first respondent the mortgaged property in satisfaction of part of the mortgage debt. In 1914 an action was brought on behalf of the creditors to set aside the conveyance and for other relief, on the ground that the first respondent, as an inspector, was precluded from purchasing the property. The first respondent pleaded, amongst other defences, s. 5 of the Limitations Act, which provides that no action for the recovery of land shall be brought save within ten years of the cause of action accruing.

Held, that the first respondent, though not an express trustee, was in a fiduciary relation to the creditors and could not enter into the transaction without making to them a full disclosure of all material facts within his knowledge: but that if he had failed to do so, s. 5 of the Limitations Act was a defence to the action, since the exception to s. 47, above set out, applied where a trust had arisen before the transaction impeached, and not where it arose only by reason of that transaction.

Judgment of the Appellate Division affirmed.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Ontario (December 26, 1918) reversing a judgment of Lennox J.

**Present*: VISCOUNT FINLAY, VISCOUNT CAVE, LORD SUMNER, and LORD PARMOOR.

The action was brought by the appellant in the Supreme Court of Ontario on July 21, 1914, on behalf of herself and all other persons entitled under the trusts of an assignment for the benefit of creditors made by W. T. Taylor (the appellant's husband deceased), G. A. Taylor, and J. F. Taylor to E. R. C. Clarkson, a respondent, and dated June 14, 1901, against Robert Daniel (upon whose death his executors were substituted), the said E. R. C. Clarkson, and the Canadian Northern Pacific Ry. Co.

J. C.
1919
TAYLOR
v.
DAVIES.

The appellant by her statement of claim prayed that the trusts of the above-mentioned assignment might be enforced, and that a conveyance, dated February 10, 1902, from the defendant Clarkson to the defendant Davies might be set aside and cancelled ; she further claimed an account, a receiver and other relief. The statement of claim alleged that the land the subject of the conveyance and of which the defendant Davies had been a mortgagee, was of much greater value than the amount due under the mortgage (a part of which was taken in satisfaction), that the said defendant as an inspector of the estate (under R. S. Ont., 1897, c. 127) was disqualified from purchasing the equity of redemption from the defendant Clarkson, and that the conveyance was a breach of trust.

The defendant Robert Davies by his defence pleaded, *inter alia*, that the consideration for the conveyance fairly represented the value of the land at the time when the conveyance was made, that a meeting of the creditors had authorized the defendant Clarkson to execute it, that there had been no breach of trust, and that the plaintiff was estopped by her laches and delay ; he further pleaded that the right (if any) to bring the action did not first accrue within ten years before its commencement and relied on s. 5 of the Limitations Act (R. S. Ont., 1914, c. 75).

The facts and the terms of the material enactments appear from the judgment of their Lordships.

The action was tried by Lennox J., who delivered his considered judgment on May 7, 1917. The learned judge came to the conclusion that Davies was an express trustee, or, in all events, owing to his fiduciary position as one of the inspectors

J. C. of the estate of the insolvents, he was under and subject to the
1919 same obligations and disabilities as an express trustee, and
TAYLOR directed that the conveyance in question should be set aside
v. and that he should account to the assignee for all moneys
DAVIES. received by him on a sale of part of the lands to Canadian
Northern Railway Company, and for all moneys received by
him in connection with the business carried on, and that he
should pay over to the assignee all profits therefrom to be held
by the assignee upon the trusts of the assignment for the
benefit of creditors dated June 14, 1901.

The respondents appealed to the Appellate Division, which allowed the appeal and dismissed the action. The learned judges (Meredith C.J.O., and Maclaren, Hodgins, Magee, and Ferguson J.J.A.) held unanimously that the defendant Davies was not an express trustee, and that s. 5 of the Limitations Act was a defence to the action. The learned Chief Justice was also of opinion that the transaction was not a purchase but a valuation of Davies' security in pursuance of s. 20 of R. S. Ont., 1897, c. 147. Ferguson J., upon a consideration of the evidence, was of opinion that the action should be dismissed apart from those defences, on the ground that it was not established that there had been a failure by Davies to communicate knowledge which he had at the time of the conveyance. The appeal is reported at 41 Ont. L. R. 403.

1919, Nov. 18, 19, 20, 21. *Sir John Simon K.C.*,
H. J. Scott K.C., *McCarthy K.C.* and *Wiley* for the appellants. The appellant was entitled to the relief granted by the trial judge. Davies was an inspector of the estate, appointed under R. S. Ont., 1897, c. 127, s. 17, at the date of the purchase. The resolution passed by the creditors on July 5, 1901, under which the inspectors were to realize the assets to the best advantage constituted him an express trustee for them. In any case he was in a fiduciary relation and could not purchase without their consent upon a full disclosure of all material facts: *Ex parte Bennett* (1), *Randall v. Errington*, (2) *In re Canada Woollen*

(1) (1805) 10 Ves. 381.

(2) *Ibid.* 423.

Mills Co. (1) The evidence showed that the property was of far greater value than the purchase consideration. Davies, from his connection with it, must have known its true value. Fraud is not a necessary element in order to set aside the conveyance. The transaction cannot be regarded as a valuing of Davies' security in pursuance of s. 20 of R. S. Ont, 1897, c. 127; the assignee did not comply with s. 17 of that Act. The Limitations Act afforded no defence to the action. The action was not one to recover land but to enforce a trust; s. 5 of the Act therefore did not apply: *Faulds v. Harper*. (2) In any case the claim is within the second exception in s. 47, sub-s. 2, of the Limitations Act, since it is one to recover trust property still retained by a trustee. Davies was an express trustee, but if not he was a constructive trustee and among the classes of constructive trustees recognized in *Soar v. Ashwell* (3) as being in the same position as an express trustee for purposes of the statutes of limitation. Davies' possession was under a trust within the third category of constructive trusts referred to by Bowen L.J. (3) in that case, "he received trust property and dealt with it in a manner inconsistent with the trusts of which he was cognizant." *Burdick v. Garrick* (4) and *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.* (5) also show that the Limitations Act affords no defence to a constructive trustee. Even if under the English authorities the statutes of limitation are available, they are excluded by the terms of the second exception in s. 47, sub-s. 2. The section expressly provides that in it "trustee" is to include a constructive trustee. Sect. 48, sub-s. 2, also excludes the defence of limitation.

[Their Lordships desired that the respondents' counsel should deal first with the question under the Limitations Act.]

Tilley K.C. and *G. Lawrence* for the respondents, the executors of Robert Davies. The plaintiff's claim was not established by the evidence. Assuming however that it was,

J. C.
1919
TAYLOR
v.
DAVIES.

(1) (1905) 9 Ont. L. R. 367.

(2) [1893] 2 Q. B. 390.

(3) *Ibid.* 396, 397.

(4) (1870) L. R. 5 Ch. 233.

(5) [1912] A. C. 555.

J. C.
1919
TAYLOR
v.
DAVIES.

the Limitations Act afforded a defence in law. Under s. 47 of that Act Davies was entitled to avail himself of s. 5. That section applies since the action was substantially one to recover land; s. 47, sub-s. 2 (b), also applies to the claim. The exception to s. 47 which is relied on does not apply. The Limitations Act does not purport to deprive trustees of any of their remedies, and the section should be construed according to the law existing when it was passed. Davies became a constructive trustee of the property and was not within any of the categories of constructive trustees mentioned in *Soar v. Ashwell* (1) as being in the position of express trustees. Davies received the property in his own right and not in the capacity of a trustee; there was no antecedent trust. The judgments in *Soar v. Ashwell* (2) show that the principle upon which the exception is based applies only when there was a trust antecedent to possession being obtained. [They were stopped.]

H. J. Scott K.C. replied.

Dec. 18. The judgment of their Lordships was delivered by

VISCOUNT CAVE. This is an appeal from a judgment of the first Appellate Division of the Supreme Court of Ontario, reversing the judgment of Lennox J. in favour of the plaintiff, and directing judgment to be entered dismissing the plaintiff's action with costs.

The action was brought by Isabella Taylor on behalf of herself and all other persons entitled under the trusts of a deed of assignment for the benefit of creditors, made by William Thomas Taylor (the husband of the plaintiff), George Arthur Taylor and John Frederick Taylor, and dated June 14, 1901. The principal defendant was Robert Davies, who will be referred to as "the defendant"; and the object of the action was to set aside a release by the trustee of the deed to the defendant of certain property forming part of the trust estate on the ground that the defendant being in a fiduciary position was disabled from acquiring the property from the trustee. The plaintiff's allegations were

(1) [1893] 2 Q. B. 390, 396, 397.

(2) *Ibid.* 394, 397.

disputed, and it was pleaded that the action was brought too late, and was barred by the plaintiff's laches and the Limitations Act.

The material facts may be stated as follows :—Prior to June 14, 1901, the firm of Taylor Brothers, consisting of the three persons above named, owned, among other property, 144 $\frac{1}{4}$ acres of land in the valley of the River Don, within three miles of the centre of the city of Toronto. Upon part of this land the firm had carried on since 1891 the business of brick-making. By a deed dated November 28, 1894, the land was mortgaged to the defendant Davies for a sum of 73,362 dollars with interest, the total sum owing on this mortgage at the date of the assignment hereafter mentioned being a little over 100,000 dollars. Towards the middle of the year 1901, Taylor Brothers became financially embarrassed, and on June 14, 1901, the firm made an assignment for the benefit of its creditors under the Act respecting Assignments and Preferences by Insolvent Persons then in force in Ontario (R. S. Ont. 1897, c. 147). By this deed the partners granted and assigned all their real and personal property to the respondent E. R. C. Clarkson (a chartered accountant) upon trust to sell and convert the same into money, and to apply the proceeds, first to the payment of expenses (including advances made by the assignee and his remuneration); secondly, in payment to the creditors of their debts rateably in compliance with the above-mentioned Act, and to pay the balance (if any) to the debtors.

The Act provided (by s. 17) that it should be the duty of the assignee within five days from the date of the assignment to convene a meeting "for the appointment of inspectors and the giving of directions with reference to the disposal of the estate" by mailing a notice of the meeting to every creditor known to him, and by advertisement in the *Ontario Gazette*, and that all other meetings to be held should be called in like manner. There was no express provision as to the duties of the inspectors. The rights of secured creditors were dealt with by s. 20, of which sub-s. 4 was as follows :—"Every creditor, in his proof of claim, shall state

J. C.
1919
TAYLOR
v.
DAVIES.

J. C.
1919
TAYLOR
v.
DAVIES.

whether he holds any security for his claim or any part thereof ; and, if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon ; and the assignee, under the authority of the creditors, may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the assignee has realised such security ; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate."

On or shortly after the date of the execution of the assignment, Clarkson prepared a statement of affairs showing the assets and liabilities of the firm. Among the secured liabilities he included the liability to the defendant on his mortgage, and estimated the approximate value of the security at 35,000 dollars, leaving a net liability to the defendant of about 65,000 dollars. The statement showed a total estimated deficiency of about 135,000 dollars. On June 21, 1901, the defendant made an affidavit of claim in which he put his claim under the mortgage at 100,164 dollars, but did not value his security as required by the statute. On June 25, 1901, an agreement was entered into between the defendant and Clarkson by which, after reciting that the amount due to the defendant on his mortgage exceeded the value of the property covered by it, it was agreed that the defendant should rent the brickyard from Clarkson for a month at twenty-five dollars. The defendant held possession of the land under this agreement until the delivery of the release hereafter mentioned. On July 5, 1901, there was a meeting of creditors of the firm at which the defendant was present, and on the motion of one of the creditors it was resolved that six persons, of whom the defendant was one, "be appointed inspectors of the estate with power, in conjunction with the assignee, to realize upon the assets to the

best advantage." On July 31, 1901, the solicitors for the defendant wrote to the assignee stating that the defendant desired to retire from the position of inspector, and on September 3 the defendant himself sent to the assignee a formal letter of resignation. But it appears that Davies' resignation did not then take effect, as he afterwards, in June, 1902, executed a deed as inspector and attended a meeting of inspectors. Further, on July 3, 1902, he signed and forwarded to the assignee a formal instrument of resignation as inspector of the estate; and it would appear that his retirement was not complete until the last-mentioned date.

The property containing $144\frac{1}{4}$ acres (including the brick-yard) had considerable potential value, containing as it did brick-earth of good quality and of such variety as to enable the owner to manufacture and supply the different kinds of bricks required for building purposes. The land was well situated near the centre of Toronto, where there was a large and growing demand for bricks. The assignee caused the land to be valued by two surveyors named Stewart and Galley, and they valued the land, buildings and machinery at 45,000 dollars; but it seems that this valuation was somewhat hastily made, and that the valuers had no special knowledge as to the brick-making business. In the month of February, 1902, the deed of release which the plaintiff in this action claims to have set aside was prepared by the defendant's solicitor and forwarded to the trustee for execution. By this deed, which was dated February 10, 1902, and was made between Clarkson of the first part and the defendant Davies of the second part, after reciting (among other things) that "it had been agreed by and between the parties thereto that the party of the first part would assign and convey to the party of the second part all his interest in the land above mentioned, upon condition that the party of the second part would accept the said lands in satisfaction of a certain amount of the moneys secured by the said mortgage and for which the party of the second part would be entitled to prove against the estate of Taylor Brothers," it was witnessed that in consideration of one dollar paid by

J. C.
1919,
TAYLOR
v.
DAVIES.

J. C. the defendant to Clarkson the latter granted and released
1919 to the defendant in fee simple the above-mentioned land
TAYLOR amounting to $144\frac{1}{4}$ acres. On April 22, 1902, there was
v. a meeting of the inspectors of Taylor Brothers, at which the
DAVIES. defendant was present, and the following extract appears
— in the minutes of this meeting: "On the motion of Mr.
Worrell it was agreed to accept the valuation of 45,000 dollars
for the brickyard and plant covered by mortgage to Mr.
Robert Davies for 100,000 dollars. Mr. Davies was to rank
on the estate for the balance of the claim, and the release of
the equity of redemption was given to Mr. Worrell to pass
upon."

On April 24, Mr. Davies wrote to Mr. Clarkson as follows:
"Pursuant to the arrangement made with you, I beg to
notify you that in consideration of your having given me
a quit claim deed of the property comprised in the Don
Valley Brick Works, I have agreed to waive my right to
rank on the above estate for 45,000 dollars of the claim of
100,000 dollars proved by me in respect of the mortgage
which I hold from Taylor Brothers. The sum of 45,000
dollars is the valuation which has been made of the said
property."

On April 30, Mr. Worrell, who had been requested to
"pass upon" (i.e., to advise upon) the form of release,
wrote to Clarkson that it was in somewhat different form
from that generally given by an assignee, and that it would
be better to follow the procedure of the Act, and if necessary
to have the transaction confirmed by the creditors. On
June 7, doubtless in pursuance of this advice, the assignee
sent to the creditors a notice, signed by him, in the
following form: "In the matter of the Estate of Taylor
Brothers. Notice is hereby given that a meeting of Creditors
of the above will be held at the office of the undersigned on
Wednesday, June 18, at 3 o'clock p.m., to consider the settle-
ment and ranking of secured claims and such other business
as may come before the meeting."

This notice was perhaps in form sufficient to cover the
proposed confirmation of the release to the defendant; but

it appears to their Lordships that it did not give to the creditors any real or effective information as to the transaction which it was proposed that they should sanction. The notice was not, as required by the Act, advertised in the *Ontario Gazette*. A meeting was duly held on June 18, but the minutes have been lost. It appears from the evidence that very few creditors attended the meeting, and that a resolution approving the release to the defendant was carried with little or no dissent. On or about September 15, 1902, the release dated February 10, 1902, was executed by the trustee and delivered to the defendant, who thenceforth remained in possession of the property under the release. He proceeded to develop the brickfield, spending considerable sums in the provision of plant and machinery, and there is no doubt that it turned out to be a property of considerable value. The dividend paid to the creditors of Taylor Brothers was less than three cents in the dollar.

In the year 1909 the James Bay Railway Company (now the Canadian Northern Ontario Railway Company) in exercise of their statutory powers took part of the brickfield containing 11.85 acres for railway purposes; and in an arbitration as to the amount of compensation to be paid to the defendant in respect of this land he was awarded in the month of May, 1912, no less than 238,583 dollars. It seems probable that the publication of this award called the attention of the plaintiff (who was the wife of William Thomas Taylor, one of the partners, and the executrix of another partner, John Frederick Taylor, and was herself a creditor on the estate for 6,000 dollars) to the value of the property and on July 21, 1914, the writ in this action was issued by her against Robert Davies, E. R. C. Clarkson and the railway company. By the statement of claim, which was delivered on October 15, 1914, the plaintiff alleged that the land was of much greater value than the amount due to the defendant Davies under his mortgage, and that the defendant as an inspector of the estate was disqualified from purchasing the property; and the plaintiff claimed to have the trusts

J. C.
1919
TAYLOR
v.
DAVIES.

J. C.
1919
TAYLOR
v.
DAVIES.

of the assignment for the benefit of creditors enforced, to have the conveyance to Davies dated February 10, 1902, set aside and cancelled, and to have the amount of the award paid into Court, or in the alternative to redeem the mortgage of November 28, 1894. No claim was made against Clarkson personally. The defendant Davies denied the allegations and pleaded among other defences the Limitations Act and the plaintiff's delay. At the trial there was very little evidence as to the value of the property in question in 1902, but two witnesses called on behalf of the plaintiff stated that in their opinion the property was then worth not less than 500,000 dollars. Stewart and Galley were not called as witnesses. Davies was in bad health and could not be called as a witness. He has since died.

The action was tried by Lennox J., who determined the issues both of fact and of law in favour of the plaintiff. He held that the property was worth far more than the value that had been put on it for the purposes of the deed of release ; that the defendant Davies was disabled by his position as inspector from becoming the purchaser of the property ; that the plaintiff was not barred by acquiescence from impeaching the transaction ; and that the Limitations Act did not apply. He accordingly made an order setting aside the release of the equity of redemption (subject to the title of the railway company to the land taken by them) and directing full accounts and consequential relief upon that footing. On an appeal by the defendants to the Appellate Division of the Supreme Court of Ontario, that Court reversed the decision of Lennox J. The learned judges of the Supreme Court were not agreed in their views as to the position of the defendant at the time of his purchase ; but they were unanimously of opinion that the Limitations Act applied and afforded a defence to the action, and they accordingly dismissed the action with costs. From this decision the present appeal is brought.

Upon the argument of the appeal before this Board, the appellant was heard upon the whole case ; but, having regard to the view which their Lordships were disposed to take of

the defence of the Limitations Act, the respondent rested his case upon the statute and was not heard upon the facts. In these circumstances their Lordships must assume for the purposes of this judgment only that the facts are as stated above; and upon that assumption it follows that at the date of the transaction which is impeached the defendant, although not a trustee of the estate, was still an inspector, and as such was under an obligation to keep a watch upon the assignee and to see that the assets were realized to the best advantage. If so, he was beyond question in a fiduciary relation to the general body of creditors and was disabled (under the ordinary rules of equity) from becoming a purchaser of any part of the estate or making any other arrangement with the assignee for his own benefit, except upon the condition of making full disclosure of all material facts within his knowledge; giving full credit for the value of his bargain; and obtaining the consent of the creditors.

It has been suggested that the transaction in question was not a transaction of sale and purchase, that the defendant was entitled as a secured creditor to exercise the power conferred upon him by s. 20 of the Assignments and Preferences Act by valuing his security and (with the consent of the assignee) retaining it at the value so specified, and that the release can be upheld as having been made under that section; but their Lordships are unable to accept this view of the transaction. Doubtless the defendant was not treated as an ordinary purchaser, and some regard was had in the form of the assignment to his position as a mortgagee, but the requirements of the statute relating to a secured creditor were not complied with. He did not (as required by the Act) put a specified value on his security so as to give the assignee an opportunity of taking it over at an advance of 10 per cent. of such value; nor did the assignee, before consenting to the defendant retaining the security at the price of 45,000 dollars and ranking for the excess of his claim, duly obtain the authority of the creditors. It is true that at the meeting of June 18 some resolutions purporting to give such authority appear to have been passed; but having

J. C.
1919
TAYLOR
v
DAVIES.
—

J. C.
1919
TAYLOR
v.
DAVIES.

regard to the insufficient notice given to the creditors of the nature of the proposals which were to be put before the meeting and to the absence of the advertisements required by the statute, their Lordships cannot regard these resolutions as effective consent within the statute. In effect there was an arrangement between the assignee and the defendant under which, without complying with the formalities required by law, the defendant obtained a release of the equity of redemption on releasing the estate from part of his secured debt; and to such an arrangement the disabilities imposed upon the defendant by his fiduciary position apply.

Now it is clear that the conditions under which alone such a transaction can be upheld were not fulfilled. The character and prospects of the brickfield, although probably well known to the defendant, who was in possession under his agreement of tenancy, were never properly ascertained by the assignee or communicated to the creditors. It is not shown that full value was given for the property, and the evidence (so far as it goes) points to the conclusion that if the property had been offered publicly a much larger price would have been obtained for it. Doubtless some of the creditors assented to the transaction, but these were a small minority of the whole body, and it is doubtful whether, when they gave their assent they did so with knowledge of the material facts. In these circumstances, it appears to their Lordships that the arrangement, if impeached at the time, could not have stood but must have been set aside. It is not shown that the plaintiff only shortly before she brought her action had such knowledge of the facts as to be barred by laches or acquiescence from seeking such remedy as she may have. It follows that the true and only defence to the action (if any) is a plea of the Limitations Act, and that defence must now be considered.

The Limitations Act (now consolidated as R. S. Ont., 1914, c. 75) provides (by s. 5) that no person shall bring an action to recover any land or rent but within ten years after the time at which the right to bring such action first accrued to him or to some person through whom he claims; and

(by s. 20) that where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring any action to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the mortgagee's title or of his right of redemption has been given.

J. C.
1919
TAYLOR
v.
DAVIES.

Sect. 47 of the Act (which corresponds with s. 8 of the English Trustee Act, 1888) contains the following provisions : “ (1.) In this section ‘ trustee ’ shall include an executor, an administrator and a trustee whose trust arises by construction or implication of law, as well as an express trustee, and shall also include a joint trustee. (2.) In an action against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply : (a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee. (b) If the action is brought to recover money or other property, and is one to which no existing statute of limitation applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received ; but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.”

J. C.
1919
TAYLOR
v.
DAVIES.

The interval between the delivery of the release to the defendant in September, 1902, and the date of the commencement of these proceedings exceeded ten years, and the defendant accordingly relied upon the above provisions as a sufficient defence to the action.

It was contended on behalf of the appellant that the plaintiff's claim was excepted from the provisions of s. 47 of the Act as being (in the words of sub-s. 2) a claim "to recover trust property or the proceeds thereof still retained by the trustee," and this on two alternative grounds. First, it was said that, having regard to the terms of the resolution of July 5, 1901, under which the defendant was appointed an inspector, he was an express trustee of the estate who at the time when the action was brought still retained part of the trust property, and that he fell as an express trustee within the exception above mentioned. Their Lordships are unable to agree with this contention. It is true that the inspectors were empowered by the resolution in question to "realize upon the assets" in conjunction with the assignee; but the assets were not vested in them, and the assignee remained the sole trustee of the assets and was entitled to realize them subject only to the supervision of the inspectors.

Secondly, it was said that the defendant, having acquired the property in question at a time when he was disabled by his fiduciary position from so doing, became at all events a constructive trustee of the property, and so fell within the same exception, and this argument requires careful examination.

In order to ascertain the effect of the Trustee Act, 1888, and the corresponding Canadian statute, it is necessary to refer to the antecedent law of limitation as it applied to trustees. It is clear that apart from these statutes an express trustee could not rely, as a defence to an action by his beneficiary, either upon the statutes of limitation or upon the rules which were enforced by Courts of equity by analogy or in obedience to those statutes. The possession of an express trustee was treated by the Courts as the

possession of his *cestuis que trustent*, and accordingly time did not run in his favour against them. This disability applied, not only to a trustee named as such in the instrument of trust, but to a person who, though not so named, had assumed the position of a trustee for others or had taken possession or control of property on their behalf, such (for instance) as the persons enumerated in the judgment of Bowen L.J. in *Soar v. Ashwell* (1), or those whose position was in question in *Burdick v. Garrick* (2), *In re Sharpe* (3), *Rochevoucauld v. Boustead* (4), and *Reid-Newfoundland Co. v. Anglo-American Telegraph Co.* (5) These persons, though not originally trustees, had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named. It followed that their possession also was treated as the possession of the persons for whom they acted, and they, like express trustees, were disabled from taking advantage of the time bar. But the position in this respect of a constructive trustee in the usual sense of the words—that is to say, of a person who, though he had taken possession in his own right, was liable to be declared a trustee in a Court of equity—was widely different, and it had long been settled that time ran in his favour from the moment of his so taking possession. This rule is illustrated by the well-known judgment of Sir William Grant M.R., in *Beckford v. Wade*. (6). “It is certainly true,” said that learned judge, “that no time bars a direct trust, as between *cestui que trust* and trustee; but, if it is meant to be asserted, that a Court of equity allows a man to make out a case of constructive trust at any distance of time, after the facts and circumstances happened out of which it arises, I am not aware, that there is any ground for a doctrine, so fatal to the security of property as that would be; so far from it, that not only in circumstances, where the length of time would render it

J. C.

1919

TAYLOR

v.

DAVIES.

(1) [1893] 2 Q. B. 390.

(2) L. R. 5 Ch. 233.

(3) [1892] 1 Ch. 154.

(4) [1897] 1 Ch. 196.

(5) [1912] A. C. 555.

(6) (1805) 17 Ves. 87, 97.

J. C.
1919
TAYLOR
v.
DAVIES.

extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear, that relief would originally have been given upon the ground of constructive trust, it is refused to the party, who after long acquiescence comes into a Court of equity to seek that relief."

So in *Soar v. Ashwell* (1) Lord Esher M.R. stated the rule as follows (2):—"If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of the Court of equity, the defendant a trustee for the plaintiff, the Court of equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the Court of equity allows statutes of limitation to be vouched." And in the same case Bowen L.J., speaking of constructive trusts of this kind, said: "That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been clearly and long established." (3)

As to the pre-existing law, then, there is no question; but it is contended for the appellant that the recent statute has altered the law in this respect. Sect. 47, sub-s. 1, it is said, defines a trustee as including "a trustee whose trust arises by construction or implication of law," and, accordingly, the exclusion from s. 47, sub-s. 2, of a claim to recover "trust property or the proceeds thereof still retained by the trustee" must apply to property in the hands of a constructive trustee or of any person claiming under him otherwise than by purchase for value without notice. If this contention be correct, then the section, which was presumably passed for the relief of trustees, has seriously altered for the worse the position of a constructive trustee, and (to use the words of Sir William Grant in the case above cited) a doctrine has been introduced which may be "fatal to the security of property." It does not appear to their Lordships that the

(1) [1893] 2 Q. B. 390.

(2) Ibid. 393.

(3) Ibid. 395.

section has this effect. The expressions "trust property" and "retained by the trustee" properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. In other words, they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction. The exception no doubt applies, not only to an express trustee named in the instrument of trust, but also to those persons who under the rules explained in *Soar v. Ashwell* (1) and other cases are to be treated as being in a like position; but in their Lordships' opinion it does not apply to a mere constructive trustee of the character described in the judgment of Sir William Grant.

J. C.
1919
TAYLOR
v.
DAVIES.

It is to be noticed also that, while s. 49 of the Limitations Act prescribes the time at which a right to recover land is to be deemed to have accrued in the case of an express trustee, and provides that subject to s. 47 "no claim of a cestui que trust against the trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitation," there are no similar provisions in respect of a constructive trustee; and it is to be presumed, therefore, that such a trustee remains entitled to such protection as he had before the passing of the Act.

For the above reasons it appears to their Lordships that in the present case time ran in favour of the defendant Davies as from the date of the delivery to him of the release in question, and accordingly, that the Limitations Act afforded a good defence to that defendant in this action. They will accordingly humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

Solicitors for appellants : *Charles Russell & Co.*

Solicitors for respondents, the executors of Robert Davies : *Freshfields & Leete.*

(1) [1893] 2 Q. B. 390.

J. C.*

[PRIVY COUNCIL.]

1920

Feb. 12.

UNION STEAMSHIP COMPANY OF NEW }
 ZEALAND, LIMITED } APPELLANTS;

AND

MARY ROBIN RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Negligence—Death—Damages—Common Employment—Construction of Statute—Amended Section—Omission of Negative Provision—Deaths by Accident Compensation Act, 1908 (No. 39), ss. 3, 5—Workers' Compensation Act, 1908 (No. 248), s. 62—Workers' Compensation Amendment Act, 1911 (No. 34), s. 13.

The Deaths by Accident Compensation Act, 1908, of New Zealand, confers in words almost identical with those of the Fatal Accidents Act, 1846 (Imp.), known as Lord Campbell's Act, and the amending Act of 1864, a right of action where the death of a person is caused by the wrongful act of another. The Workers' Compensation Act, 1908, of New Zealand, s. 62, gives to a servant who is injured by the negligence of a fellow-servant a right of action against his employer, it being provided by sub-s. 3 (substituted for the original sub-s. 3 in 1911) that "in an action brought under this Act in respect of the negligence of a fellow-servant," the damages shall not exceed 500*l*. Sub-s. 3, as enacted in 1908, contained an express provision, omitted in the amended sub-section, that the sub-section should not affect the damages in an action against an employer in respect of the death of a servant.

In 1917 an action was brought under the Deaths by Accident Compensation Act, 1908, in respect of the death of a person by the negligence of a fellow-servant:—

Held, that the damages were not limited to 500*l*., the cause of action and the measure of damages being different from that which the deceased person would have had if he had survived.

The mere omission in a later statute of a negative provision contained in an earlier one cannot by itself have the result of a substantive affirmation. It is necessary to see how the law would have stood without the original proviso, and the terms in which the repealed sections are re-enacted.

British Columbia Electric Ry. Co. v. Gentile [1914] A. C. 1034 applied. Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal of New

Present: VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, and LORD ATKINSON.

Zealand (January 30, 1918) affirming, by an equal division of opinion, an order of Hosking J.

The question for determination in the appeal was whether in an action brought in New Zealand under the Deaths by Accident Compensation Act, 1908, against an employer in respect of the death of a servant caused by the negligence of a fellow-servant, the damages recoverable were limited to 500*l.* by the Workers' Compensation Amendment Act, 1911, s. 13.

Hoskins J. by an order in chambers dismissed a summons by which it was sought to reduce the claim to that sum. By reason of an equal division of judicial opinion, the Court of Appeal affirmed the order.

1900. Jan. 22, 23. *Compston K.C.* and *Simey* for the appellants. The damages recoverable in the action were limited to 500*l.* The accident being caused by the negligence of a fellow-servant there was, apart from s. 62 of the Workers' Compensation Act, 1908, no cause of action whether the injured man survived or died. But the cause of action given by that section is limited by the condition in sub-s. 3. The respondent cannot avail herself of s. 62 in order to gain a cause of action without being subject to the condition upon which the cause of action is given. The authorities show that if the deceased workman had bound himself by contract not to sue, the contract would have bound his dependants; the same principle applies where by statute the cause of action is fettered by a condition: *Pym v. Great Northern Ry. Co.* (1); *Griffiths v. Earl of Dudley* (2); *Williams v. Mersey Docks and Harbour Board.* (3). Sect. 62, sub-s. 3, as enacted in 1908, expressly provided that nothing in the sub-section should affect the measure of damages in an action in respect of the death of a servant. The sub-section substituted in 1911 contains no similar words; it must be concluded that the intention in 1911 was that the limitation should apply in the event of death. [Reference was also made to *British Columbia*

J. C.
1920
UNION
STEAMSHIP
COMPANY
OF
NEW
ZEALAND
v.
ROBIN.

(1) (1863) 4 B. & S. 396.

(2) (1882) 9 Q. B. D. 357.

(3) [1905] 1 K. B. 804.

J. C. *Electric Ry. Co. v. Gentile* (1) and *Robinson v. Canadian Pacific Ry. Co.* (2)]

UNION
STEAMSHIP
COMPANY
OF
NEW
ZEALAND
v.
ROBIN.

M. Comyn K.C. and *J. Comyn* for the respondent. The omission in the amended sub-s. 3 of the final words in the sub-section as enacted in 1908 has not the effect of a substantive enactment that the limitation shall apply to an action in respect of death. That view is negatived by the course of legislation in New Zealand with regard to rights against employers. There is nothing to affect the express provision in s. 5 of the Deaths by Accident Compensation Act, 1908, that the jury may award such damages as they see fit. The new sub-s. 3 is expressly confined to "actions under the Act." The authorities show that the cause of action under Lord Campbell's Act is a different cause of action from that which the deceased person would have had: *Seward v. Vera Cruz (Owner of)* (3); *British Columbia Electric Ry. Co. v. Gentile*. (1) [They were stopped.]

Compston K.C. replied.

Feb. 12. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The question that arises for determination in this case is defined and limited by the summons taken out by the defendants on July 23, 1917. This asks that the plaintiff's claim, a claim brought by an adopted child to recover damages for the death of one John Robin, should be reduced to 500*l.*, upon the ground that his death was caused by the negligence of a fellow-servant and that, by s. 13 of the Workers' Compensation Amendment Act, 1911, "no servant shall be entitled to recover from his employer . . . in respect of the negligence of a fellow-servant a larger sum by way of damages . . . than 500*l.*" Hosking J., the learned judge before whom the matter first came for hearing, dismissed the summons. The appeal to the Court of Appeal of New Zealand was heard by four learned judges. They were equally divided in their opinions—Denniston J. and Chapman J. approving the judgment of Hosking J., while

(1) [1914] A. C. 1034.

(2) [1892] A. C. 481.

(3) (1884) 10 App. Cas. 59.

Stout C.J. and Cooper J. dissented—with the result that the original judgment stood, and from that judgment the defendants have brought the present appeal.

The question that arises is a pure question of law and depends upon the construction to be placed upon various Acts of Parliament. The history of the legislation is fully set out in the judgment of Cooper J. and need not be repeated, for it throws no light upon the meaning of the three relevant statutes. The first of these is the Deaths by Accident Compensation Act, 1908 (No. 39 of 1908). This Act by s. 3 confers, in words almost identical with those of Lord Campbell's Act, a right of action in certain circumstances where the death of a person is caused by the wrongful act of another. The words of the section are important, and they are these: "Where the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." Sect. 5 provides that the suit shall be brought in the name of the executor, and adds the provision that the jury may give to the parties respectively for whom and for whose benefit the action was brought "such damages as they think proportioned to the injury resulting from the death."

The effect of s. 3 was considered by the Board in the case of *British Columbia Electric Ry. Co. v. Gentile*. (1) The statute in that case was a statute of British Columbia, but it was in the same terms, apart from immaterial differences, with the statute in the present case. The question which then arose for decision was whether a limitation of six months as a period within which any person who was damaged by a certain tramway, or the operations of the tramway company, could commence an action, was applicable as against the father and mother of a man who had been knocked down and killed by one of the trams, and it was held that it

(1) [1914] A. C. 1034.

J. C.
1920
UNION
STEAMSHIP
COMPANY
OF
NEW
ZEALAND
v.
ROBIN.

was not. The earlier cases which are referred to in the judgments in the Court of Appeal in the present case are carefully examined in the judgment that was then delivered by the Board, and the position is summed up in these words (1): "This, however, does not end the matter, for although the action under Lord Campbell's Act or the Families Compensation Act is not an action of indemnity for negligence, yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such 'as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof.'"

This judgment places beyond controversy the law which has been built up by a series of cases of unvarying tendency. They show that neither the cause of action nor the measure of damage in an action brought by the dependants of a dead man is identical with that which would have been possessed by the deceased himself. It is merely that upon the happening of certain events and the satisfaction of certain conditions a right of action is conferred, and one of the conditions is that the death is caused in such a manner as would have entitled the party injured to maintain an action and recover damages.

In the present case, the accident being due to the negligence of a fellow-workman, but for remedial legislation the deceased man could never have maintained such a suit, and consequently the condition precedent established by the statute would not have been satisfied. The doctrine of common employment has, however, been removed by certain statutes in New Zealand, the first of which is the Workers' Compensation Act of 1908 (No. 248 of 1908). Sect. 62 of that Act is in these terms: "62. (1.) When any injury or damage is suffered by a servant by reason of the negligence of a fellow-servant, the employer of those servants shall be liable in damages in respect to that injury or damage in the same manner and in the same cases as if those servants had not been engaged in a common

(1) [1914] A. C. 1041.

employment. (2.) This section applies to every case in which the relation of employer and servant exists, whether the contract of employment is made before or after the commencement of this Act, and whether or not the employment is one to which the other provisions of this Act apply. (3.) No servant shall be entitled to recover from his employer in respect of the negligence of a fellow-servant (whether the right of action is conferred by this section or exists independently of this section) a larger sum by way of damages for any one cause of action than five hundred pounds. Nothing in this sub-section shall affect the measure of damages in an action brought against an employer in respect of the death of a servant."

But this section has again been amended by s. 13 of the Workers' Compensation Amendment Act, 1911 (No. 34), and this is the statute now operative. Sect. 13 is as follows : " 13. Section sixty-two of the principal Act is hereby amended by repealing sub-section three and substituting the following : (3.) No servant shall be entitled to recover from his employer in an action brought under this Act in respect of the negligence of a fellow-servant a larger sum by way of damages for any one cause of action than five hundred pounds."

The argument based upon these provisions is this : That the express proviso in the original section which exempted from the limitation as to damage an action brought in respect of a dead servant is not repeated in the amending statute ; that it must be assumed to have had some definite purpose, and that, as it is removed, it must follow that the limitation it was designed to avoid has been once more reimposed.

That view found favour with Cooper J., who stated his opinion in these words : " Some effect must be given to this alteration of the law, and I am of opinion although not without some doubt that the result is to limit the amount which the personal representatives of a servant or the dependants of a servant can recover in consequence of the death of the servant through the negligence of a fellow-servant to the sum of 500*l.*, the maximum amount which the servant himself could have recovered for the injury sustained by him."

With this opinion their Lordships are unable to agree. The

J. C.
1920
UNION
STEAMSHIP
COMPANY
OF
NEW
ZEALAND
v.
ROBIN.
—

J. C.
1920
UNION
STEAMSHIP
COMPANY
OF
NEW
ZEALAND
v.
ROBIN.

mere omission in a later statute of a negative provision contained in an earlier one cannot by itself have the result of effecting a substantive affirmation. It is necessary to see how the law would have stood without the original proviso, and the terms in which the repealed sections are subsequently re-enacted. The real question is whether, with the statute as it now stands, the limitation imposed on the servant is extended to his dependants and successors. The argument in support of the appellants' case is best put in the assertion that as, without an express statutory relief from the doctrine of common employment, no suit could be maintained, and such relief being conferred by a section which limits the remedy, the whole of these conditions must be imported into every action to which the doctrine of common employment would have afforded a defence. Their Lordships cannot accept this view. The only operation of the doctrine of common employment in a suit by the dependants of a dead man would be that the conditions precedent were not satisfied. The dead man could not have brought an action in respect of damage or injury. This he can now do. But although in the action that he might have brought there would have been a limitation as to damage, there is nothing to restrict the right expressly conferred by s. 5 of the Deaths by Accident Compensation Act enabling the jury to give damages as they think proportioned to the injury resulting from the death.

In forming this opinion their Lordships have the misfortune to differ from Stout C.J. He regarded the basis of the action as the right of the deceased person to sue. He realized that the damages were independent and that the action was a new and independent action. But it appears from his judgment that he regarded the dependant's right as affected by the infirmity attaching to the rights of the dead man. This is, in fact, the reasoning contained in the following extract from his judgment: "What then is the cause of action given by the Deaths by Accident Compensation Act to the plaintiff? First it is clear that the basis of the action must be the right that the deceased person had to sue, for s. 3 already quoted says that the act neglect or default must if death had not

ensued have entitled the party injured to maintain an action and recover damages in respect thereof. Now the right that was given to the person who died was a special and limited right—that is, he had only a right to sue for a sum not exceeding 500*l.* It is true that a relative could not sue for certain things for which he could sue such as mental suffering: see *Blake v. Midland Ry. Co.* (1), and therefore in one sense the mode of arriving at the damages sustained is different in the two actions. It has, however, to be remembered that the right of action that the deceased person had was given by the Workers' Compensation Act; it was not a right at common law, and the basis of the suit of the present plaintiff is the right of action that the deceased had. The right of action is based on s. 62, which allowed a workman to sue an employer for negligence even though the negligence was the act of a fellow-servant, and in giving this new right of action, it was expressly provided that the damages could not be more than 500*l.*" This view necessarily involves the conclusion that the dependant's rights are limited by those of the deceased, but it does not in their Lordships' opinion afford an accurate exposition of the law.

The cause or basis of the action is the death of the workman under certain conditions. It is not his action that is transmitted, but a new right of action arising on his death with a consequent measure of damage independent of that by which the deceased would have been limited. Their Lordships see no difference between the restrictions by which the law, apart from statute, would have regulated the claim of the workman, and the limitation expressly imposed upon those rights by Act of Parliament; yet in the former case it is plain such conditions did not affect the dependants, for they established a standard inapplicable to their claim.

The damages which the dependants are entitled to recover are such damages as the jury think proportional to the injury, and on this right no statutory limitations have been imposed.

The contention that if the workman had in the interval between the injury and his death accepted payment in full as

(1) (1852) 18 Q. B. 93, 110.

J. C.
1920
UNION
STEAMSHIP
COMPANY
OF
NEW
ZEALAND
v.
ROBIN.

to his claim, the dependants would have been disentitled to sue, and that consequently a modification of his claim must also modify their rights is not in their Lordships' opinion sound. The right of the workman to claim is a right which must exist on his death, and if by any means that right has been taken away, the conditions cannot be satisfied which enabled the dependants to sue.

In the present case the right to sue was unimpaired, it was only the damage to be recovered which was controlled. For these reasons their Lordships think that this appeal should be dismissed with costs, and the respondent must have her costs in the Court of Appeal. They will humbly advise His Majesty accordingly.

Solicitors for appellants : *William A. Crump & Son.*
Solicitor for respondent : *H. Z. Deane.*

J. C.*
1920
Feb. 17.

[PRIVY COUNCIL.]

QUEBEC RAILWAY, LIGHT, HEAT }
AND POWER COMPANY, LIMITED } APPELLANTS ;

AND
VANDRY AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Quebec)—Negligence—Onus of Proof—Thing under Defendant's Care—Electricity Supply—Statutory Powers—Civil Code of Quebec, art. 1054.

Upon the true construction of art. 1054 of the Civil Code of Quebec a person capable of discerning right from wrong is responsible, without proof of negligence, for damage caused by things which he has under his care, unless he establishes that he was unable to prevent the event which caused the damage.

* *Present* : VISCOUNT CAVE, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD DUNEDIN.

The appellant company, acting under statutory powers, had erected along a road in Quebec two overhead cables for the distribution of electric current at tensions of 2200 volts and 108 volts respectively, and they supplied current at 108 volts to the respondents' premises. A violent wind (not amounting to force majeure) tore a branch from a tree growing about 28 feet away from the cables, and drove it against them. In consequence the cables were broken down, and the high-tension current found its way along the low-tension cable into the respondents' premises, and caused a fire. The respondents brought an action for damages against the appellants:—

Held, that the appellants were liable for the damage without proof that they had been negligent, since they had failed to establish that they could not have prevented the escape of the electric current; further, that the appellants' statutory powers afforded no defence, since the escape of the current was not necessarily incident to the exercise of those powers.

The Civil Code of Quebec should be interpreted in the first instance solely according to the words used, the Code, or at least cognate articles, being read as a whole forming a complete scheme. It is only if the meaning is not plain that light should be sought from exterior sources, such as decisions in Quebec earlier than the Code, or the exposition of similar articles of the Code Napoléon.

Canadian Pacific Ry. Co. v. Roy [1902] A. C. 220 and *Dumphy v. Montreal Light, Heat and Power Co.* [1907] A. C. 454 distinguished.

Judgment of the Supreme Court of Canada affirmed.

APPEAL by special leave from a judgment of the Supreme Court of Canada (March 3, 1916) reversing a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec (April 8, 1915) and restoring the judgment of the Superior Court of that Province.

The respondents brought actions, consolidated for the purpose of the present appeal, against the appellant company, in the Superior Court of Quebec, claiming to recover damages for the destruction of premises in Quebec by a fire arising from an escape of high-tension electric current under the circumstances stated in the judgment of their Lordships.

Arts. 1053 and 1054 of the Civil Code of Quebec are set out in the footnote (1), the words of the French text, where relevant to the arguments, appearing in brackets.

(1) The Civil Code of Quebec provides:—

Art. 1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to

another, whether by positive act, imprudence, neglect or want of skill.

Art. 1054. He is responsible not only for the damage caused by his own fault, but also for

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

The principal Act from which the appellants derived their powers was 58 & 59 Vict. (Dom.), c. 59. By s. 13 they had power, with the consent of the local authorities, to erect and maintain poles along highways for supplying electric power by wires, it being provided, *inter alia*, “(e) the Company shall be responsible for all damage which their agents, servants, or workmen cause to individuals or property in carrying out or maintaining any of its said works. . . .” The said Act was amended by 62 & 63 Vict. (Dom.), c. 85, which altered the name of the company, and by s. 2, gave power to furnish and sell in the city and district of Quebec light, heat and motive power generated from electricity and to work wires for the conducting of electricity.

The trial judge, Dorion J., held that the appellants were responsible under art. 1054 of the Code for the damage caused, since in his view it had not been established that they could not have prevented the event which caused the damage. He found, *inter alia*, that the wind which caused the tree branch to fall upon the appellants’ cables did not amount to force majeure which it was impossible to foresee and guard against; without expressly finding that the defendant company had been negligent, he considered that they should have grounded their electrical transformers as a means of preventing accidents of the kind which happened; he also found that the electric wiring in the premises in

that caused by the fault of persons under his control and by things which he has under his care [sous sa garde].

The father, or, after his decease, the mother, is responsible for the damage caused by their minor children;

Tutors are responsible in like manner for their pupils;

Curators or others having the legal custody of insane persons, for the damage done by the latter;

Schoolmasters and artisans, for the damage caused by their

pupils or apprentices while under their care.

The responsibility attaches in the above cases [la responsabilité ci-dessus a lieu] only when the person subject to it fails to establish that he was unable to prevent the act [le fait] which has caused the damage.

Masters or employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

question though old-fashioned was not defective, and was capable of carrying safely current at 108 volts. In the result he gave judgment for the plaintiffs.

The Court of King's Bench (Appeal Side) by a majority reversed the judgments of the Superior Court, and dismissed the actions. The majority (Archambeault C.J., Lavergne J. and Pelletier JJ.) held, shortly stated, that though art. 1054 created a presumption against the company, it had been established within that article that the accident was caused by force majeure without fault on their part. The dissenting judges (Cross and Carroll JJ.) were of opinion that the company was responsible under art. 1054 as it could by grounding its transformers have prevented what happened. The proceedings before the Appeal Side are reported at Q. R. 24 K. B. 214.

The Supreme Court of Canada by a majority reversed the judgments of the Appeal Side and restored those of the Superior Court. The majority (Idington, Anglin and Brodeur JJ.) held that under art. 1054 the company was liable as they had failed to establish that they were unable to prevent the escape of the high tension current, a dangerous thing under their care, or that the damage thus caused had resulted from the fault of the owners of the premises. The defence of force majeure was not open, as the event could have been foreseen and provided against. Anglin and Brodeur JJ. were further of opinion that the company was liable under s. 13 (e) of their Act (58 & 59 Vict. (Dom.), c. 59), above set out, whether or not fault or negligence were proved. Davies and Duff JJ. dissented; they were of opinion that under art. 1054 the onus lay upon the plaintiff to prove that the injury complained of resulted from the fault of the thing which the defendant had under his care, and that the company was not liable since no fault on their part had been proved. They considered that the damages were caused by force majeure. There was no liability under the section of the special Act, since the damage was not the result of the exercise of the powers conferred. The proceedings in the Supreme Court are reported at 53 Can. S. C. R. 72.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

1919. Nov. 27, 28; Dec. 1, 2. *Macmaster K.C.*, *Douglas Hogg K.C.* and *Hon. S. O. H. Collins* for the appellants. In the absence of proof of negligence the appellants were entitled to succeed. Art. 1054 of the Civil Code forms part of a group of articles dealing with torts and quasi-torts, it postulates a proof of fault. Before the decision of the majority of the Supreme Court in *Shawinigan Carbide Co. v. Doucet* (1) it had been consistently held that there could be no liability under arts. 1053 and 1054 without proof of fault: *St. Lawrence Sugar Refining Co. v. Campbell* (2); *Mercier v. Morin* (3); *Montreal Rolling Mills Co. v. Corcoran* (4); *Tooke v. Bergeron* (5); *Canada Paint Co. v. Trainor* (6); *Guardian Fire and Life Assurance Co. v. Quebec Ry., Light and Power Co.* (7); *Canadian Pacific Ry. Co. v. Dionne*. (8) The effect of the clause in art. 1054 referred to as the "exculpatory" clause is to give a defence when a defendant has not been negligent, but a person under the control of the defendant has been. The words "in the above cases" refer only to the specific instances, beginning with "the father," and ending with "schoolmasters and artisans." The last paragraph of the article relating to the responsibility for servants and workmen is inconsistent with the view that the words "in the above cases" cover the general words at the beginning of the article. That view also involves an inanimate object being competent to do "an act." The construction of art. 1054 adopted by the majority in *Doucet's Case* (1) was arrived at by a consideration of the views of French jurists upon art. 1384 of the Code Napoléon, a consideration to which weight should not have been given: *Maclaren v. Attorney-General for Quebec*. (9) The proposed construction of art. 1054 is inconsistent with the judgments of the Privy Council in *Canadian Pacific Ry. Co. v. Roy* (10) and *Dumphy v. Montreal Light, Heat and Power Co.* (11)

(1) (1909) 42 Can. S. C. R. 281.

(2) (1885) M. L. R. 1 Q. B. 290.

(3) (1892) Q. R. 1 Q. B. 86.

(4) (1896) 26 Can. S. C. R. 595.

(5) (1897) 27 Can. S. C. R. 567.

(6) (1898) 28 Can. S. C. R. 352.

(7) 1906) 37 Can. S. C. R. 676.

(8) (1908) Q. R. 18 K. B. 385.

(9) [1914] A. C. 258, 279.

(10) [1902] A. C. 220.

(11) [1907] A. C. 454.

Those decisions establish that since the appellants were acting under statutory powers they were not liable in the absence of proof of negligence. The effect of the statutory powers was to make the principle of *Rylands v. Fletcher* (1) inapplicable. Sect. 13 (e) of the company's principal Act imposed a liability for damage in executing the authorized works, not in the user of them: *Shelfer v. City of London Electric Lighting Co.* (2); *Hammersmith Ry. Co. v. Brand.* (3) Lastly, if the appellants' construction of art. 1054 is wrong, the damage was caused by the tree which was not a thing in the care of the appellants.

Upjohn K.C., *T. Mathew*, and *Cannon* for the respondents. Upon the true construction of arts. 1053 and 1054 the appellants were liable without proof of negligence unless they established, which they failed to do, that they could not have prevented what happened. The question of construction depends upon the language used in the Code; it cannot be narrowed by a consideration of the law prevailing in Lower Canada in 1866, and it is conceded that considerations of decisions on the Code Napoléon are not legitimate: *Trust and Loan Co. of Canada v. Gauthier* (4); *Herse v. Dufain.* (5) There was no body of judicial opinion in Canada before 1909 as to the true construction of art. 1054; the majority of the cases referred to did not deal with that article: *Doucet's Case.* (6). Art. 1054 is not simply an expansion of art. 1053; the latter article deals with delicts the former with quasi-delicts obligations ob rem. The exculpatory clause applies to all that precedes it in the article, as appears from the French text. If fault is to be proved with regard to things under a person's care, then art. 1054 adds nothing to art. 1053 as to that class of case. The last clause of art. 1054 is a qualification of the exculpatory clause in the case of master and servant. The respondents' construction of the articles makes the Code establish liability upon the same grounds as in English, Scotch, the Civil, and

J. C.

1920

QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.
—

(1) (1868) L. R. 3 H. L. 330.

(2) [1895] 1 Ch. 287.

(3) (1869) L. R. 4 H. L. 171.

(4) [1904] A. C. 94, 101.

(5) (1872) L. R. 4 P. C. 468.

(6) 42 Can. S. C. R. 281, 340, 341.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

Roman-Dutch law: *Rylands v. Fletcher* (1); *Eastern and South African Telegraph Co. v. Cape Town Tramways Co.* (2); *Greenock Corporation v. Caledonian Ry. Co.* (3) The principle contended for has been applied in the case of electric current in *National Telephone Co. v. Baker* (4) and in the decision of the Privy Council in 1902 above mentioned. The escape of the electric current was the cause of the damage; the judgment of the trial judge, which was restored by the Supreme Court, is conclusive on that question. The fall of the tree was a *causa sine qua non*, not the proximate cause of the damage. The appellants' statutory powers afford no defence, since they are subject to the statutory provision in art. 1054. There is no repugnancy, because the escape of the current was not a necessary incident to the exercise and of the powers: *Hammersmith Ry. Co. v. Brand* (5); *Canadian Pacific Ry. Co. v. Roy*. (6) Whatever may be the true construction of art. 1054, the evidence establishes that the appellants were negligent in not grounding their transformers, and that that precaution would have prevented the damage; they were consequently liable under art. 1053.

Macmaster K.C. replied.

Feb. 17. The judgment of their Lordships was delivered by

LORD SUMNER. The principal object of this appeal is to settle the true construction of art. 1054 of the Civil Code of Lower Canada. Special leave to appeal was given on the terms that the five actions brought in the Courts below should be consolidated and that the appellants should raise only questions of law.

The appellant company generates and distributes electricity in the City of Quebec and its neighbourhood, and along the St. Foye Road, in which the respondents' houses are situated, the company had erected poles carrying two overhead cables, a primary cable charged with electricity at 2200 volts and a secondary cable from which electricity was supplied to the

(1) (1868) L. R. 3 H. L. 330.

(2) [1902] A. C. 381.

(3) [1917] A. C. 556, 575.

(4) [1893] 2 Ca. 186.

(5) L. R. 4 H. L. 171, 215.

(6) [1902] A. C. 220, 229.

houses at 108 volts. There were many trees along the road-side and in the adjacent enclosures and at the time in question a violent wind had torn a branch, coated with frozen rain, from a poplar growing some distance within one of the enclosures and had driven it against these cables, though many feet away. They broke down in consequence, and thus the high tension electricity found its way along the secondary cable into the customers' houses and set them on fire. For the loss thus caused the actions now consolidated were brought against the appellant company.

Though no article of the Code is referred to by number in the declaration, it is plain that both arts. 1053 and 1054 were relied on, and so the cases were treated both at the trial by Dorion J., and in the Court of King's Bench on appeal and in the Supreme Court of Canada. There was much difference of opinion among the judges, but the Supreme Court, by a majority of one, restored the judgment of Dorion J. in favour of the plaintiffs.

Two questions of law arise upon the Code—(1.) whether the plaintiffs can succeed without proving negligence or "faute" against the company; (2.) whether even so the defendants would succeed, if they proved that they could not have prevented the fire. In the Courts below it was argued for the defendants that they could not have foreseen the combination of bad weather overloading the branches with verglas and of wind breaking off the branch and driving it laterally on to the cables, and that they were accordingly the victims of force majeure. As to this the findings of fact are against them. It was also argued for the plaintiffs that if the defendants had installed suitable apparatus they would have received automatic warning at the central station of the breakdown of the cable in St. Foye Road in time to have cut off the current before any mischief was done, but, as nothing was made of this below, it need not be pursued now.

The question whether and under what circumstances a defendant can be made liable in a case of quasi-deliict, unless actual faute is proved against him, has been much discussed

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

in Quebec in recent years. The case of *Shawinigan Carbide Co. v. Doucet* (1) brought the controversy to a head in 1909, and the Supreme Court was then divided in opinion. The present case renewed both the controversy and the division. In *Doucet's Case* (1), which arose between employer and employee, no definite cause could be discovered for the explosion by which the plaintiff was injured. In the present case the cause of the occurrence is known. The issue, moreover, arises in the present case between contractor and customer. Accordingly that case might be no authority in the present case, but for the fact that in Quebec both cases depend on the language of the Code. Unfortunately this seems to have been imperfectly appreciated in the Canadian Courts, and the question, "What do the words of arts. 1053 and 1054 mean as a matter of construction?" was not in either case always kept in the forefront.

The opposing views may be summarised thus, without always referring them to the particular judgments in which they are stated. *Faute*, it is said, is the basis of all liability for quasi-delict. To hold a man liable for either delict or quasi-delict, when he is not to blame, is unjust. This must be so in principle and it rests also on authority. The whole jurisprudence of Quebec before *Doucet's Case* (1) so holds. Since the Code was enacted, it has been so interpreted, and the decisions before the Code were to the same effect. Furthermore, the framers of the Code were directed to codify existing law and, if they suggested alterations, to indicate which of their proposed articles differed from the existing law, and they did not so indicate arts. 1053 and 1054. As a matter of language these articles can be made to give effect to these principles, (1.) by holding that art. 1054 does not amplify and carry on art. 1053, and impliedly therefore rests on *faute*, as art. 1053 does expressly, or (2.) by holding that para. 6 of art. 1054, the "exculpatory" paragraph, applies to the first paragraph of the article as well as to the others, and implies that *faute* must be proved by the plaintiff before the defendant can be called upon for an excuse,

(1) 42 Can. S. C. R. 281.

or (3.) by holding that para. 1 of art. 1054 really specifies circumstances from which faute may be presumed, leaving the defendant to rebut it by any evidence that may be available.

The contention on the other hand is that the Civil Code of Lower Canada was founded on the Code Napoléon, from which it differed only in language, and that the reasoning of recent decisions of the French Courts on the corresponding art. 1384 ought to be applied, the prior decisions of the Canadian Courts notwithstanding. The result is to apply a principle thus formulated by Fitzpatrick C.J., in *Doucet's Case* (1): "Celui qui perçoit les émoluments procurés par une machine susceptible de nuire au tiers, doit s'attendre à réparer la préjudice que cette machine causera—ubi emolumentum ibi onus." Art. 1054 must be held to raise a presumption of faute against the defendant company as the basis of responsibility "non seulement du dommage qu'elle cause par sa propre faute, mais encore de celui causé . . . par les choses qu'elle a sous sa garde." In other words, the fact of the accident supplies all the proof of negligence which it is necessary for the plaintiff to give.

It seems plain that both these trains of reasoning start rather from the text of the Code Napoléon as interpreted by French Courts and the general jurisprudence of Quebec than from the very words of arts. 1053 and 1054 themselves. Natural as this may be, the statutory character of the Civil Code of Lower Canada must always be borne in mind. "The connection between Canadian law and French law dates from a time earlier than the compilation of the Code Napoléon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law": *Maclaren v. Attorney-General for Quebec*. (2) Thus, however stimulating and suggestive the reasoning of French Courts or French jurists upon kindred subjects and not dissimilar texts undoubtedly is, "recent French decisions, though entitled to the highest respect . . . are not of binding authority

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

(1) 42 Can. S.C.R. 281, 284.

(2) [1914] A. C. 258, 279.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

in Quebec" (*McArthur v. Dominion Cartridge Co.* (1)) still less can they prevail to alter or control what is and always must be remembered to be the language of a Legislature established within the British Empire. In the present case, as in *Doucet's Case* (2), the learned judges of the Supreme Court of Canada sedulously, and as they conceived successfully, conformed to this rule and decided, though in different ways, a question of construction of the Quebec Code in accordance with reasoning which seemed none the less convincing because it was suggested by French authors or followed a view long laid down by the Courts in Quebec. Nor can the history of the Quebec Code be altogether banished from the recollection of those who administer its provisions, and it is true that under certain conditions it is legitimate to refer to the prior cases which it was intended to codify: *Bank of England v. Vagliano*. (3) A construction of articles which have long been before the Courts, differing from that hitherto accepted, will always, even in a tribunal not bound by prior decisions, be adopted with caution.

Still, the first step, the indispensable starting-point, is to take the Code itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior sources. Of course it must not be forgotten what the enactment is, namely, a Code of systematized principles and rules, not a body of administrative directions or an institutional exposition. Of course also the Code, or at least the cognate articles, should be read as a whole, forming a connected scheme; they are not a series of detached enactments. Of course, again, there is a point at which mere linguistic clearness only masks the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the Legislature. Whether particular words are plain or not is rarely susceptible of much argument. They must be read

(1) [1905] A. C. 72, 77.

(2) 42 Can. S. C. R. 281.

(3) [1891] A. C. 107, 145.

and passed upon. The conclusion must largely depend on the impression formed by the mind that has to decide.

In the present case their Lordships have arrived at the conclusion that the language of the articles is plain, in the sense that their meaning must be found in their words, though they are far from denying that the true construction is a matter of nicety and even of difficulty. It follows that the decision of this question is not legitimately assisted even by reference to the prior decisions in Quebec, which, in fact, are much less definite than they have been supposed to be, and that no useful suggestion can be derived from articles in the Code Napoléon differently expressed, or from the expositions of them, however brilliant, by learned French jurists. In no event can the intention of the Legislature in passing the articles under discussion be gathered from the category in which they were placed by the commission which drafted the Code.

Arts. 1053 and 1054 are the first two of a group of articles headed "Offences and quasi-offences." The first deals with damage caused by faute on the part of a person who can tell right from wrong. The second deals further with the liability of such a person not only for damage caused by his own fault, but also for damage caused by persons whom he controls or things which he has under his care. It is not necessary now to define the meaning of "controls" or "under his care." There is obviously much to be said in a proper case about both. The article proceeds to speak specifically of the liability of parents for the acts of infant children, of guardians for those of wards, of curators for those of lunatics, and of teachers and artisans for those of scholars and apprentices. Then follows provision for what has been called "exculpation," a term, which, however, begs the question that culpa is implied in the "responsabilité ci-dessus." To this succeeds a rule as to the responsibility of masters and employers for their servants and workmen. Subsequent passages deal with responsibility for damage done by animals, or by buildings originally ill constructed or afterwards allowed to get out of repair.

J. C.

1920

QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

J. C.
 1920
 QUEBEC
 RAILWAY,
 LIGHT,
 HEAT
 AND
 POWER
 COMPANY
 v.
 VANDRY.

The language of the exculpatory clause is as follows :
 "The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage." From this it is argued that the exculpatory clause does not refer at any rate to that part of the first paragraph which contains the words "and by things which he has under his care"; first, because "the act which has caused the damage" cannot be applicable to a case of "damage caused by things which he has under his care," for the act of a thing would be a meaningless expression; and secondly, because "the above cases" means only the "cases" properly so called of parent and child and so forth, which figure as particular cases, and even though taken together are far from exhausting the first paragraph.

In the French text, however, the exculpatory clause is as follows: "La responsabilité ci-dessus a lieu seulement lorsque la personne qui y est assujettie ne peut prouver qu'elle n'a pu empêcher le fait qui a causé le dommage." On these words it is pretty plain that the above comment, founded only on the English text, fails. "La responsabilité ci-dessus" refers to the whole preceding part of the article, every paragraph of which contains expressly or by implication the word "responsible," and "le fait qui a causé le dommage" is an expression not inapt to cover damage caused by inanimate things as well as by animate persons.

Behind this linguistic criticism lies the structure of the article. Art. 1053 deals with damage caused by the defendant's own faute. Art. 1054 takes up another and a wider responsibility—namely, for damage otherwise caused, whether by persons or by things. It deals with what may be conveniently called vicarious responsibility, and this under three categories: (a) persons who know right from wrong, and would therefore be themselves liable also for their own faute under art. 1053; for these the defendant answers on the principle of respondeat superior; (b) persons, knowing right from wrong, and therefore personally liable, who though not strictly falling under that principle impose a vicarious

liability on the defendant because they are under his control in one capacity or another ; and (c) persons who do not know right from wrong, and things, animate or inanimate, for whom the defendant answers on the ground of his control or charge, his being the only responsibility which the law recognizes. Paras. 2, 3, 4 and 5 are not mere instances of para. 1 : they include persons incapable of knowing right from wrong, who are therefore outside of the words " the fault of persons under his control." They make a defendant liable when the actor himself is incapable of *faute* and is therefore guiltless of it and another person is made liable for him vicariously, regardless of any *faute* of his own. This position as applied to persons is the same as that which para. 1 applies to things. Such being the object of the article it would be illogical to refuse to the defendant, who is called on to answer for things in his care, the same exculpation—namely, that he could not have prevented the injurious occurrence, which is open to him when called on to answer for minors, lunatics or apprentices under his control.

If, then, it is open to a defendant sued in respect of damage done by things in his care to raise a defence under the " exculpatory paragraph," the next question that arises is whether before the defendant can be called on to excuse himself the plaintiff must prove that there was *faute* on the defendant's part, or whether proof of the facts (1.) that a certain thing was under the defendant's care and (2.) that the plaintiff was hurt by it, will in themselves suffice to discharge the whole of the plaintiff's burthen. First of all, art. 1054 expressly goes beyond art. 1053 in that, after saying " non seulement du dommage qu'elle cause par sa *faute à autrui*," which refers to art. 1053, it takes up another's *faute*, " mais encore de celui causé par la *faute de ceux dont elle à la contrôle*," that is to say not caused by the defendant's own fault. Indeed, if *faute* must be proved against the defendant before he can be made liable under art. 1054, it is difficult to see what efficacy attaches to the exculpatory clause at all. If the defendant is proved to have been guilty of *faute*, how can he say that he could not

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

J. C.
1920
—
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.
—

have prevented its consequences ? If he is not, he needs no exculpation. Secondly, there is no reason why the usual rule should not apply to this as to other statutes—namely, that effect must be given, if possible, to all the words used for the Legislature is deemed not to waste its words or to say anything in vain. Accordingly, the observation at once applies that, if the defendant must be guilty of *faute* before art. 1054 can apply, art. 1054 is otiose, for he might have been made liable for that *faute* under art. 1053. There can be no answer to this argument, unless it be that the *faute* required under art. 1053 is *faute* causing the damage, and that under art. 1054 *faute* not causing the damage is brought in, and this cannot be the intention of the Code, for then under art. 1054 a person would be answerable for damage done by things under his care when his conduct has been blameworthy in some immaterial respect, but not when he has been blameless altogether. In other words he would be visited with civil liability to a private person as a penalty for some unconnected error, and an injured person's right to compensation for damage actually sustained would depend on the question whether the defendant was a person not beyond reproach or was a person of invincible impeccability. In the third place, to hold that even under art. 1054 the plaintiff must prove *faute* against the defendant would have the singular result that either masters would not be responsible for the *faute* of their servants, unless they were also guilty of *faute* themselves, or the seventh paragraph of the article would have to be read without the implication of *faute*, which on this construction is to be made in the first.

There seems to be no doubt that art. 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances, all of which are independent of that personal element of *faute* which is the foundation of the defendant's liability under art. 1053. Furthermore, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively

that he was guilty of no faute. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of faute and a liability defeasible by proof of inability to prevent the damage.

Their Lordships fully appreciate that a considerable number of points can be made against this construction. It is said that absolute liability without faute shown was unknown in Quebec before *Doucet's Case*. (1) It would, perhaps, be more correct to say that the occasion for so deciding has only recently arisen with the growth of scientific inventions and their industrial exploitation. It may be said that art. 1054 is not the place for obligations arising from what art. 983 calls "the operation of the law solely," but is confined by the title of this group of articles to "delicts and quasi-delicts"; that absolute liability for damage done for things under a man's care, whether those things be in themselves dangerous or not, and whether or not they have been brought into the condition which makes them dangerous for purposes of the defendant's own, is a liability transcending the rule in *Rylands v. Fletcher* (2) and *Nichols v. Marsland* (3) and might work great injustice; that art. 1054 does not begin with the words "Toute personne est responsable," but with the words "Elle est responsable," "Elle" referring to the words of art. 1053—namely, "Toute personne capable de discerner le bien du mal," a reference which is pointless if the faute of such "personne" is immaterial and if all that is needed is that in fact the thing should be under his care. To all this the plain words of the article, if they are plain as their Lordships conceive them to be, are a sufficient answer. In enacting the Code the Legislature may have foreseen cases of the kind now in question many years before any of them arose. In construing it *Rylands v. Fletcher* (2) and *Nichols v. Marsland* (3) had better be left out of account. There is no reason why

J. C.

1920

QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

(1) 42 Can. S. C. R. 281.

(2) L. R. 3 H. L. 330.

(3) (1876) 2 Ex. D. 1.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

the Code should be made to conform to them. The mere title given to a group of articles is not in itself enough to contradict the prescriptions of one of them. As to the fact that the article begins with "Elle" and not with "Toute personne," it may be that a person incapable of knowing good from evil would be also incapable of having others under his control or of having things under his care, or at any rate would by that very incapacity be entitled to exculpation, on the ground that, if he could not tell right from wrong, neither could he prevent the "fait" which caused the damage. Even if this be not so, the only result would be to exempt from liability under art. 1054 persons incapable of knowing right from wrong, though they may occupy the positions mentioned. As no case of this kind arises here, no decision or opinion need be given about it. The positive words of the article stand and must have effect.

Two other points may be briefly disposed of. The poplar tree grew in the field of one of the plaintiffs and belonged to him, and both the houses burnt belonged to customers of the defendant company. Though these points were touched upon, it is not clear what legal consequence was supposed to result from them. The owner of the poplar was not shown to have been in fault and, even if every tree that grows is "in the charge" of its owner, the tree was not the cause of the damage, but only an antecedent prerequisite. As to the other point there was no evidence that the owner of the houses consented to take the risk of what happened or even knew of it, and if it is said that the exploitation of the electricity was not solely for the supplier's benefit, but also for the consumer's, which is somewhat far-fetched, the article says nothing about the liability of exploiters. On neither of these points have the facts been found, so as to raise in the appellant's favour any contention requiring decision.

Apart from the articles of the Code the appellants resorted to a separate line of argument. The powers under which they carry on their undertaking are statutory and are contained some in private and some in public statutes. Their

Lordships think there is no substance in the objection taken by the respondents that under art. 10 of the Code private statutes must be pleaded, which implies proof, and that evidence was not given of the private statutes in this case. The article does not provide that if such evidence is not forthcoming the same result may not be obtained by admissions; and as all the statutes without distinction were the subject of discussion in the Courts below, as if the terms of both kinds of legislation had been duly brought before the Court, and as the printed text was in fact readily available, their Lordships think that this objection is not now open to the respondents.

The powers which these statutes give are of a very familiar type. The undertakers are authorized to carry and distribute high-tension electricity over cables, which may be either overhead or underground. Sect. 13 of 58 & 59 Vict. c. 58, expressly provides that the company may erect, equip and maintain poles in the streets for the purpose of working and maintaining its lines for the conveyance of electric power upon, along, across, over and under the same. It was contended by the respondents that sub-s. (e) of this section, by the words, "the Company shall be responsible for all damage which its agents, servants or workmen cause to individuals or property in carrying out or maintaining any of its said works," made the company absolutely liable for the damage sued for in the present case. Their Lordships think that, as an independent cause of action, this case fails. The damage here is not, in any view of the construction of the sub-section, caused in carrying out or maintaining works.

The appellants, however, rely on the authority to carry their wires overhead which the statutes give, as an answer to the claim, and contend that the statutes exclude the operation of arts. 1053 and 1054 of the Code in matters concerning the distribution of high-tension electricity by overhead cables, as repugnant to the power which the Legislature has bestowed. The application of enactments of this kind is familiar and well settled. Such powers are not

J. C.

1920

QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

in themselves charters to commit torts and to damage third persons at large, but that which is necessarily incidental to the exercise of the statutory authority is held to have been authorized by implication, and therefore it is not the foundation of a cause of action in favour of strangers, since otherwise the application of the general law would defeat the purpose of the enactment. The Legislature, which could have excepted the application of the general law in express terms, must be deemed to have done so by implication in such cases. Nor need a use of the power conferred which is injurious to others be excluded from the ambit of that which is necessarily incidental to their enjoyment merely because the progress of discovery or invention reveals some extraordinary means of preventing that injury to others which has previously been unavoidable. This point arose and was settled in connection with sparks falling from locomotive engines many years ago. It therefore becomes necessary to consider how far such an escape of electricity as took place in this case was incidental to the use of overhead cables and how far and by what reasonable precautions injurious consequences were preventible.

The question, whether it was necessary to hang the two sets of cables on the same poles or in such proximity to one another that the fall of the branch upon one would lead to the flow of the high-tension current into the other, hardly seems to have been examined at the trial. The main contention is this. It was the result of voluminous evidence called at the trial, and indeed in their Lordships' view the company's case, that, if the wires of the transformers which are used at intervals along the line of cable had been grounded, the escaping high-tension electricity would have found its way innocuously to earth instead of entering the houses and setting them on fire. The value of this precaution had been established by the experience of several years, but it was the view of some distributors of electricity, and of the defendant company among them, that there was an offset to this advantage in the fact that, if the wiring of the customers' houses was defective, the grounding of the

transformer wires would substitute new difficulties for the old. It was not, however, shown that the wiring of the plaintiffs' houses was defective to this extent, although it was "démodé," nor did the evidence compare the one disadvantage with the other quantitatively. The company could have inspected the wiring and, if it was not safe, could have declined to supply current. It is plain that the company was quite willing to have carried out the grounding of the transformer wires, if the representatives of the fire insurance companies, who advised this course, had given an instruction instead of a recommendation. The latter naturally pointed out that they had no authority to issue instructions but must confine themselves to advice, and as their Lordships are neither prepared to assume that this request on the appellants' part for instructions was a mere quibble, designed to disguise their own reluctance to do anything, nor even to infer that they saw any objection to the proposal except the expense of it, they conclude that the grounding of the wires of the transformers would, some substantial time before the accident in question, have been a practicable and efficient safeguard against the injury which in fact was inflicted. If so, it is impossible to say that the escape of electricity into customers' houses and the consequent damage in time of storm was a necessary incident of the exercise of the power to distribute high-tension current by overhead cables along roads, such as would by implication relieve the company from liability for the consequences.

Two decisions which were pressed on their Lordships' attention require particular examination—namely, *Canadian Pacific Ry. Co. v. Roy* (1) and *Dumphy v. Montreal Light, Heat and Power Co.* (2) The former is a case of damage by the escape of sparks from a locomotive engine and the decision in terms is in line with the well-known authorities of *Vaughan v. Taff Vale Ry. Co.* (3) and *Hammersmith Ry. Co. v. Brand* (4); it is a case of "plain words

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT
AND
POWER
COMPANY
v.
VANDRY.

(1) [1902] A. C. 220.

(2) [1907] A. C. 454.

(3) (1860) 5 H. & N. 679.

(4) L. R. 4 H. L. 171.

J. C.
1920
QUEBEC
RAILWAY,
LIGHT,
HEAT,
AND
POWER
COMPANY
v.
VANDRY.

authorizing the doing of the very thing complained of.” *Dumphy v. Montreal Light, Heat and Power Co.* (1) is a case of high-tension electricity released by the act of a third party’s workman, whom the jury acquitted of negligence. No specific article of the Code is mentioned, and the presence of a high-tension current in the cable was only the *causa sine qua non* and the human action which released it was the *causa causans* of the accident. There was statutory authority to circulate high-tension electricity overhead, but on the simple issue, whether the damage caused by the escape of that electricity was caused by the company’s negligence, it was held that no negligence had been proved, and indeed but for the act of a stranger, who himself was not careless, the company’s electricity would have done no harm to anybody.

Whether in the present cases the evidence established affirmatively a case of negligence against the defendants is a question on which the Supreme Court arrived at no definite conclusion. Had it been necessary, the respondents would have been entitled to claim before their Lordships’ Board that this issue should be decided now, since the terms imposed on the appellants under the special leave to appeal bound them to rely on points of law only but did not preclude the respondents from meeting those points upon the facts in any way which the evidence warranted. In the view, however, above taken of the case no decision on this question is needed.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Stephenson, Harwood & Co.*

Solicitors for respondents: *Charles Russell & Co.*

(1) [1907] A. C. 454.

[PRIVY COUNCIL.]

J. C.*

1920

Feb. 17.

COMMISSIONERS OF TAXATION . . APPELLANTS;

AND

ENGLISH, SCOTTISH AND AUSTRA-
LIAN BANK, LIMITED . . . RESPONDENTS.ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.*Banker—Crossed Cheque—Defective Title—Liability of Banker—"Customer"
—Negligence—Bills of Exchange Act, 1909 (No. 27 of 1909, Commonwealth),
s. 88, sub-s. 1.*

The word "customer" in the Bills of Exchange Act, 1909 (No. 27 of 1909, Commonwealth), s. 88, sub-s. 1, which is in the same terms as s. 82 of the Bills of Exchange Act, 1882 (Imp.), signifies a relationship in which duration is not of the essence, and includes a person who has opened an account on the day before paying in a cheque to which he has no title.

The negligence referred to in the sub-section is negligence in collecting the cheque, not in opening the account. The test is whether the paying in of any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubt in the banker's mind, and caused him to make inquiries. The standard of care required is that derived from the practice of bankers.

Judgment of the Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court of New South Wales (August 8, 1918), affirming the judgment of Pring J.

The action was brought in the Supreme Court by the appellants against the respondents claiming 78*l.* 18*s.* 3*d.* as damages for the conversion of a cheque, or alternatively as money had and received.

The facts of the case and the terms of s. 88 of the (Commonwealth) Bills of Exchange Act, 1909, upon which the respondents relied, appear from the judgment of their Lordships.

* *Present*: VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, and LORD ATKINSON.

J. C.
1920
COMMISSIONERS
OF
TAXATION
v.
ENGLISH,
SCOTTISH
AND
AUSTRALIAN
BANK.
—

The trial judge, Pring J., dismissed the action, holding that that section afforded a defence. Upon appeal the full Court by a majority (Cullen C.J. and Ferguson J., Sly J. dissenting) affirmed the decision. The appeal is reported at 18 S. R. (N.S.W.), 417.

1920. Jan. 20. *Romer K.C.* and *Austen-Cartmell* for the appellants. Thallon had opened an account only on the day before paying in the cheque in respect of which the action is brought, and beyond taking a cheque-book had had no dealings with the bank before doing so. He was not a "customer" of the bank within the meaning of s. 88, sub-s. 1. That word connotes use and habit: Stroud's Judicial Dictionary, 2nd ed., p. 451; Paget on Banking, 2nd ed., p. 274; *Matthews v. Brown & Co.* (1); *Lacave & Co. v. Crédit Lyonnais* (2); *Great Western Ry. Co. v. London and County Banking Co.* (3) So far as a contrary view was expressed in *Ladbroke & Co. v. Todd* (4) it was obiter. If a person becomes a customer by merely opening an account, s. 88 of the Australian Act and s. 82 of the English Act leave the true owners of cheques with very little protection. The circumstances of the case were such as to put the respondents upon inquiry. They made no inquiries and therefore did not show that they had acted without negligence towards the true owner. [Reference was also made to *Bissell & Co. v. Fox Bros. & Co.* (5), *Commissioners of State Savings Bank v. Permewan, Wright & Co.* (6), *Kendall v. London Bank of Australia* (7), and *Ross v. London County Westminster & Parr's Bank.* (8)]

R. A. Wright K.C. and *Jowett* for the respondents were not called upon.

Feb. 17. The judgment of their Lordships was delivered by LORD DUNEDIN. On June 6, 1917, Mr. A. Friend, York

(1) (1894) 10 Times L. R. 386.

(2) [1897] 1 Q. B. 148.

(3) [1901] A. C. 414.

(4) (1914) 19 Com. Cas. 256.

(5) (1884) 51 L. T. 663; (1885)

53 L. T. 193.

(6) (1914) 19 C. L. R. 457.

(7) (1918) 18 S. R. (N.S.W.) 394.

(8) [1919] 1 K. B. 678.

Street, Sydney, put a cheque drawn by himself on the Australian Bank of Commerce for 786*l.* 18*s.* 3*d.* into an envelope, along with some other cheques drawn by other members of his family, and addressed the envelope to the Commissioners of Taxation, George Street North, Sydney. He gave the envelope to a clerk to deliver, and the envelope was duly delivered by being placed in a box put for the purpose of receiving such letters in the Taxation Department. The cheque was in payment of an assessment for income tax and was in the following terms :—" Pay 053 or bearer the sum of 786*l.* 18*s.* 3*d.*" It was crossed with the word " Bank," that is to say, generally not specially. The figures " 053 " correspond with the final figures on the number of the cheque, and this method of filling up a bearer cheque seems to be a common habit in Sydney. Attached to the assessment notice sent to Mr. Friend there is the following instruction :—" Collectors will not call for payment of taxes, but the taxpayer should (a) pay the tax at the Taxation Office, George Street North, Sydney, in cash or bank notes, cheques, or postal notes, payable in New South Wales ; or (b) remit the same to the Commissioners at Sydney, by bank draft, payable on demand, or cheque, crossed, and marked ' Commissioners of Taxation—not negotiable '—payable in N.S.W. ; or by Post Office money order, or by postal note, marked ' Commissioners of Taxation—not negotiable.' "

It is, therefore, to be observed that in making his payment by means of a bearer cheque delivered at the office Mr. Friend was acting in strict accordance with the instructions issued. The cheque in question was stolen by some person unknown and was never cashed by the Commissioners of Taxation.

On June 7, a man who gave his name as Stewart Thallon entered the head office of the respondents' bank at Sydney and stated that he wished to open an account. He was received by the accountant of the bank, who went through the usual procedure of taking his name and address, which he gave at certain well-known residential chambers in Sydney, and making him sign the signature-book. Being asked how

J. C.
1920
COMMISSIONERS
OF
TAXATION
v.
ENGLISH,
SCOTTISH
AND
AUSTRALIAN
BANK.

J. C.
1920
COMMISSIONERS
OF
TAXATION
v.
ENGLISH,
SCOTTISH
AND
AUSTRALIAN
BANK.
—

much he wished to bank, he replied "20l." and handed that sum in bank notes to the accountant. The accountant filled up a "paid-in" slip and handed it and the money to the teller. Thallon said he would take a cheque-book, and was given one, the charge being debited to his account. He then told the accountant that every cheque he signed for cash would be accompanied by an order to pay, and the accountant added a note to that effect to be entered in the ledger account. A ledger account was opened in the ordinary form, but no inquiry was instituted to check the authenticity of the address.

On June 8, the cheque in question was handed in with a pay-in slip to be credited to Thallon's account, which was done. Later in the same day the cheque was cleared in the ordinary manner and was paid by the Australian Bank of Commerce. On June 9, 11 and 12 three cheques for 483l. 16s. 6d., 260l. 10s. 0d. and 50l. 12s. 6d., respectively, drawn by Thallon, were presented for payment by persons each accompanied with an order signed by Thallon to pay. No more was ever seen of Thallon; no person of that name lived at the address given, and it may be taken as certain that the name of Thallon was an assumed one.

The present action was raised by the Commissioners of Taxation against the English, Scottish and Australian Bank, the ground of liability being conversion of the cheque. The defence was s. 88 of the Bills of Exchange Act, 1909 (Commonwealth of Australia), which enacts as follows:—
“(1.) Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment. (2.) A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.”

There was originally another defence, that the bank was a

holder for value, but this was decided adversely to the respondents and is not now insisted on. The appellants' reply to the plea founded on s. 88 was twofold. They said, first, that in the circumstances Thallon was not a customer, and secondly, that the bank had been guilty of negligence in receiving payment.

The action was tried before Pring J., who sustained the defence, holding that in the sense of the Act Thallon was a customer and that no negligence in the circumstances had been proved against the bank. On appeal to the Supreme Court for New South Wales the decision was upheld by a majority, Sly J. dissenting. Appeal being taken to this Board, both the points above stated were argued by the appellants. Both the questions, namely, Who is a customer? and, What is negligence? were the subjects of discussion in the case of *Kendall v. London Bank of Australia* (1), and the learned judges in the Appellate Court import by reference their opinions in that case, which was decided on the same day as the present case.

As regards the first point, namely, whether Thallon was a customer in the sense of the Act, their Lordships do not think it necessary to say much. As to this, there is unanimity among all the learned judges who tried both cases, the facts in *Kendall's Case* (1), so far as this point is concerned, being practically the same. Their Lordships are of opinion that the word "customer" signifies a relationship in which duration is not of the essence. A person whose money has been accepted by a bank on the footing that they undertake to honour cheques up to the amount standing to his credit is, in the view of their Lordships, a customer of the bank in the sense of the statute, irrespective of whether his connection is of short or long standing. The contrast is not between an habitué and a newcomer, but between a person for whom the bank performs a casual service, such as, for instance, cashing a cheque for a person introduced by one of their customers, and a person who has an account of his own at the bank. Thallon was, therefore, a customer, though one

J. C.

1920

COMMISSIONERS
OF
TAXATION

v.
ENGLISH,
SCOTTISH
AND

AUSTRALIAN
BANK.

J. C.
1920
COMMISSIONERS
OF
TAXATION
v.
ENGLISH,
SCOTTISH
AND
AUSTRALIAN
BANK.

of short standing: see the opinion of Lord Davey in *Great Western Ry. Co. v. London and County Banking Co.* (1)

The remaining point is, Was there negligence on the part of the bank in collecting the cheque? Their Lordships say "in collecting the cheque," because that is in a slightly different phrase what the statute says, "without negligence receives payment for a customer." It is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting a cheque. In the case of *Commissioners of State Savings Bank v. Permewan, Wright & Co.* (2) in the High Court of Australia, Isaacs J. says: "Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison v. London County and Westminster Bank* (3), and relevant to the present, are (1.) that the question should in strictness be determined separately with regard to each cheque; (2.) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry." If there be inserted after the words "given cheque" the words "coupled with the circumstances antecedent and present," their Lordships think this is an accurate statement of the law.

The question is necessarily a question of fact. If the case has been tried by a jury, it would be for the jury to determine under proper direction whether the bank had been negligent or not. It is true that in this case there is only the finding of a judge, and that may be reviewed on the merits, while the criterion as to the finding of a jury is not whether it is right but whether there was evidence which could support it. None the less, a finding essentially of fact will not be interfered with unless it is shown to be wrong.

(1) [1901] A. C. 414.

(2) 19 C. L. R. 457, 478.

(3) [1914] 3 K.B. 356.

This was the view held in the present case by the learned Chief Justice, and their Lordships think he was justified in the way in which he approached the question. It follows that, being a question of fact, it is really impossible to lay down rules or statements which will determine what is negligence and what is not. Each case must be determined on its own circumstances. In view, however, of what was said in the decision of the High Court of Australia above mentioned, their Lordships feel bound to say that they cannot agree with the view of the learned Chief Justice in that case where he says that the care to be taken is not less than a man invited to purchase or cash such a cheque for himself might reasonably be expected to take. This seems to their Lordships to apply an inapposite standard, for the simple reason that it is no part of the business or ordinary practice of individuals to cash cheques which are offered to them, whereas it is part of the ordinary business or practice of a bank to collect cheques for their customers. If, therefore, a standard is sought, it must be the standard to be derived from the ordinary practice of bankers, not individuals. Their Lordships think, therefore, that the evidence of bank officials in *Kendall v. London Bank of Australia* (1) as to the practice of banks was rightly tendered and received, as indeed the Court in that case decided.

Coming now to the reasons alleged for holding the learned trial judge to have been wrong in holding no negligence proved, they really amount to this, that the bank ought not to have collected a cheque for a customer who was of such recent introduction and about whom they knew nothing. There was, however, nothing suspicious about the way the account was opened. A customer, however genuine and respectable, could hardly, assuming him to start with a deposit of 20*l.* in cash, have opened it in any other way. Was then the fact that a cheque was paid into that account for collection one day after the account was opened a

J. C.
1920
COMMISSIONERS
OF
TAXATION
v.
ENGLISH,
SCOTTISH
AND
AUSTRALIAN
BANK.

(1) 18 S. R. (N.S.W.) 394.

J. C.
1920
COMMISSIONERS
OF
TAXATION
v.
ENGLISH,
SCOTTISH
AND
AUSTRALIAN
BANK.
—

circumstance of an unusual character calculated to arouse suspicion and provoke inquiry? For if it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque, it would render banking business as ordinarily carried on impossible; customers would often be left for long periods without available money. Now if the cheque here had been for some unusually large sum, perhaps suspicion might have been aroused. This is really a question of degree, and their Lordships cannot say that the trial judge was wrong in thinking that 743*l.* was not a sum of such magnitude as to create the duty of inquiry.

If the cheque had been in different form, things might well have been otherwise. Their Lordships cannot help remarking that to a certain extent the appellants have themselves to thank for what has happened, owing to the terms of their instructions. If they had insisted that in the case of payments made at the office, as they did insist in the case of drafts sent by post, the cheques should be made payable to the Commissioners of Taxation, then there would have been something on the face of the cheque to arouse inquiry. The fact that the cheque was to bearer distinguishes this case from *Commissioners of State Savings Bank v. Permewan, Wright & Co.* (1) In that case, in the case of thirty-six cheques, the cheques were drawn in favour of the Commissioners, or had such markings on them as showed that they were drawn for the purpose of paying duties. This was held, their Lordships think rightly, to be a circumstance which ought to have put the bank on inquiry when such cheques were presented by a private individual. Their Lordships do not think it necessary to consider and decide as to whether the majority or minority were right as to the other twenty-two cheques in that case, the point being whether the markings on those cheques did or did not sound such a note of alarm as ought to have put the bank on their guard.

(1) 19 C. L. R. 457.

There was here no note of warning of any kind on the cheque, and accordingly the conditions which arose in that case do not apply.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants : *Light & Fulton.*
Solicitors for respondents : *Slaughter & May.*

J. C.
1920
COMMISSIONERS
OF
TAXATION
v.
ENGLISH,
SCOTTISH
AND
AUSTRALIAN
BANK.

[PRIVY COUNCIL.]

J. C.*
1920
March 8.

McCAWLEY APPELLANT ;
AND
THE KING RESPONDENT.
ATTORNEY-GENERAL FOR ENGLAND . INTERVENER.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (Queensland)—Constitutional Law—Power of Legislature—Appointment of Judge of Supreme Court—Term of Office—Inconsistency with Constitution—Judge of Court of Industrial Arbitration—Construction of Commission—Order in Council of June 6, 1859—Constitution Act of 1867 (31 Vict., No. 38, Queensland), ss. 2, 15—Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63, Imp.), s. 5—Industrial Arbitration Act of 1916 (7 Geo. 5, No. 16, Queensland), s. 6, sub-s. 6.

The Legislature of Queensland has power to include in an Act a provision not within the express restrictions contained in the Order in Council of June 6, 1859, but inconsistent with a term of the constitution of Queensland, contained in that Order and in the Constitution Act of 1916, without first amending the term in question under the powers of amendment given to it.

The Industrial Arbitration Act of 1916 (7 Geo. 5, No. 16, Queensland) by s. 6, sub-s. 6, authorizes the Governor in Council to appoint any judge of that Court, established by the section, to be a judge of the Supreme Court of Queensland, and provides that a judge so appointed shall have the jurisdiction of both offices, and shall hold office as a judge of the

* Present : LORD BIRKENHEAD L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, and LORD ATKINSON.

J. C.
1920
McCawley
v.
The King.

Supreme Court during good behaviour; the sub-section further provides that a judge of the Court of Industrial Arbitration shall hold office for seven years. The Governor in Council, by a commission reciting s. 6, sub-s. 6, appointed the appellant, who was a judge (and the president) of the Court of Industrial Arbitration to be a judge of the Supreme Court "during good behaviour." By the Order in Council of 1859, clause 22, and the Constitution Act of 1867, s. 15, the period during which judges of the Supreme Court were to hold office was limited only by being during good behaviour:—

Held, (1.) that the Legislature of Queensland had power, both under the Colonial Laws Validity Act, 1865, s. 5, and apart therefrom, to authorize the appointment of a judge of the Supreme Court for a limited period; (2.) that s. 6, sub-s. 6, of the Act of 1916 authorized an appointment as a judge of the Supreme Court only for the period during which the person appointed was a judge of the Court of Industrial Arbitration; (3.) that the commission should be construed as appointing the appellant for the period authorized by s. 6, sub-s. 6; (4.) that the appellant accordingly was validly appointed.

Judgment of the High Court of Australia reversed.

APPEAL by special leave from a judgment of the High Court of Australia (September 27, 1918) affirming a judgment of the full Court of Queensland (August 22, 1918).

By an information of quo warranto exhibited against the appellant by certain relators, under leave of the Supreme Court of Queensland, the relators after setting out the facts which appear from the judgment of their Lordships, submitted (1.) that the commission dated October 12, 1917, purporting to appoint the appellant to be a judge of the Supreme Court of Queensland, was void on the ground that s. 6, sub-s. 6, of the Industrial Arbitration Act of 1916 was contrary to the provisions of the Constitution Act of Queensland and ultra vires; (2.) that the said commission was void on the ground, inter alia, that in so far as the commission purported to appoint the appellant for life, the Governor in Council had no power to issue the same under s. 6, sub-s. 6. The appellant by a demurrer to the information pleaded that it was bad in law on the grounds that the facts alleged did not show that he had usurped the office, and established that he was entitled thereto.

The facts and the terms of the relevant statutory provisions, and of the Order in Council of June 6, 1859, appear from the judgment of their Lordships.

The Full Court of the Supreme Court of Queensland, by a majority of four judges to one, pronounced a judgment of ouster against the appellant. Upon an appeal to the High Court of Australia that Court, by a majority of three judges to two, affirmed the decision. The views upon which both the concurring and dissenting judges in either Court based their judgments are shortly stated in the judgment of their Lordships, and the proceedings in the two Courts are reported respectively at 1918, S. R. Qd. 62 and 26 C. L. R. 9.

Special leave to appeal was granted on March 12, 1919.

J. C.
1920
McCawley
v.
THE KING.

1920. Feb. 2, 3. *Sir John Simon K.C., Micklethwait and Wishart* for the appellants. The Legislature of Queensland has power, by ordinary enactment passed by both houses and assented to by the Governor in the name of the Crown, to alter the constitution of Queensland, including the judicial institutions of the State, and the tenure of the judges. The power to alter the constitution by ordinary law exists both (a) in virtue of the Colonial Laws Validity Act, 1865, s. 5, and (b) independently of that Act, in virtue of clause 22 of the Order in Council of June 6, 1859, and ss. 2 and 9 of the Constitution Act of 1867. The Constitution of Queensland is a "flexible," as distinguished from a "rigid," constitution. The distinction between those two classes of constitutions is pointed out and discussed in Dicey's *Law of the Constitution*, 8th ed., pp. 122, 123, 141. All the laws applying to Queensland which it is competent to the Queensland Legislature to alter can be altered in the same manner by ordinary enactment. In Queensland as in the United Kingdom there is no law within the competence of the Legislature which can be regarded as fundamental or supreme, or which tests the validity of laws subsequently enacted. The use of the word "constitution" in the title of the Constitution Act of 1867 does not restrict the power of the Queensland Legislature to pass subsequent laws which either expressly or impliedly vary the constitutional arrangements of the State. Before 1916 the Legislature of Queensland had passed without objection laws giving authority to appoint judges of the Supreme Court with a

J. C. temporary tenure : e.g., 37 Vict., No. 5, and 55 Vict., No. 37.
 1920 The commission appointing the appellant follows the words
 McCawley of s. 6, sub-s. 6, of the Act of 1916, and both on general princi-
 v. THE KING. ples of construction and in virtue of s. 12a of the Acts Shorten-
 — ing Act of 1867 (Queensland) it must be construed to have
 the same meaning as the same language bears in the sub-
 section. Whether the commission confers on the appellant
 the office of a judge of the Supreme Court after he ceases
 to be the president or a judge of the Court of Industrial
 Arbitration, it certainly confers on him that office so long
 as he continues to be so ; there is therefore no justification
 for the judgment of ouster. The appellant contends that
 on the true construction of s. 6, sub-s. 6, he is a judge of
 the Supreme Court for life, subject to good behaviour,
 but the question does not at present arise. In any case
 s. 15 of the Constitution Act of 1867, which provides that
 the commissions of judges of the Supreme Court shall
 continue "during their good behaviour notwithstanding the
 demise of the Crown," cannot be construed as a prohibition
 against a limited term of office being provided by legislative
 enactment.

[Reference was also made to the enactments referred to
 in the judgment, and to Blackmore's Constitution of South
 Australia, pp. 64, 66, 67 ; also, with regard to the tenure of
 judges in England to the Act of Settlement (12 & 13 Will. 3, c. 2),
 s. 3, Colonial Leave of Absence Act (22 Geo. 3, c. 75), Judicature
 Act, 1875, s. 5, Judicature Act, 1876, s. 6, Anson's Law and
 Custom of the Constitution, 3rd ed., vol. 2, pt. 2, p. 268,
 Maitland's Constitutional History of England, p. 313, and
 Todd's Parliamentary Government, vol. ii., pp. 725, 727, 729.]

Maugham K.C. and *Northmore* for the respondent. The
 commission appointing the appellant was made without
 authority and was invalid. Sect. 6, sub-s. 6, upon its true
 construction authorized an appointment of the appellant only
 so long as he should be president, or a judge, of the Industrial
 Court. The appointment authorized is of the president or a
 judge, not of an individual, and he is to hold office as a
 Supreme Court judge in addition to his existing post. But the

commission purported to appoint the appellant during good behaviour, that is to say for life subject to good behaviour. Sect. 12a of the Acts Shortening Act of 1867 cannot be invoked to alter the plain language of the operative part of the commission. Sect. 6, sub-s. 6, so far as it purported to authorize an appointment for a limited period, was invalid since it was inconsistent with the Order in Council of 1859 and with s. 15 of the Constitution Act of 1867. It is not contended that the Queensland Legislature cannot alter the constitution of the State in matters within its competence under the Order in Council. But an alteration to be valid must be made by direct legislative enactment. The constitution can be altered but cannot be disregarded. So long as it subsists it is the test of the validity of legislation. The High Court of Australia so decided in *Cooper's Case* (1); that decision has never been questioned and is embodied in text-books: see Keith's *Responsible Government in the Dominions*, vol. i., pp. 425, 426. Sect. 106 of the Constitution of Australia enacted by the Imperial statute of 1900, although it may not take away the powers of amendment confided to State legislatures as part of their constitutions, shows that the terms of State constitutions are fundamental. If the contention is right that the provisions of the constitution with regard to the tenure of judges are fundamental, s. 5 of the Colonial Laws Validity Act, 1865, does not apply to validate an enactment which is inconsistent with those provisions.

Sir Ernest Pollock S.-G. (*Sir Gordon Hewart A.-G.* and *Branson* with him) for the intervener, the Attorney-General for England, accepted in substance the contentions on behalf of the appellant.

Sir John Simon K.C. replied.

March 8. The judgment of their Lordships was delivered by

LORD BIRKENHEAD, L.C. This is an appeal by special leave from a judgment of the High Court of Australia dated September 27, 1918, which affirmed by a majority of four

J. C.

1920

McCawley
v.
The King.

(1) (1907) 4 C. L. R. 1304.

J. C. judges to three a judgment, dated August 22, 1918, of the
1920 Full Court of Queensland, giving judgment of ouster against
McCawley the appellant upon an information of quo warranto exhibited
v. against him by certain relators, to show by what authority
THE KING. he claimed to be a judge of the Supreme Court of Queensland.

The facts which gave rise to this appeal are not in controversy, and may be shortly stated.

The Industrial Arbitration Act of 1916 (Queensland) provided by s. 6 for the establishment of a Court to be called the Court of Industrial Arbitration. Sub-ss. 1 to 5 of s. 6 are as follows: "(1.) There is hereby established a Court to be called the Court of Industrial Arbitration, which shall be a superior Court of record and shall have a seal which shall be judicially noticed. (2.) The Governor in Council shall, by commission in His Majesty's name, appoint a judge or judges of the Court not exceeding three in number. One of such judges shall be designated the President of the Court. (3.) The Governor in Council may, if and as he deems it necessary, in like manner, appoint an additional judge or additional judges of the Court. (4.) In case of the illness or absence of a judge of the Court, or, in the event of congestion of work in the Court, the Governor in Council may appoint a permanent judge of the Supreme Court or District Court, to act as a judge of the Industrial Court, and notwithstanding any Act to the contrary such judge shall so act, and whilst acting in that capacity such judge shall have all the jurisdiction and powers of a judge of the Court in addition to his jurisdiction and powers as a judge of the Supreme Court or District Court. (5.) For all purposes of status the Court of Industrial Arbitration shall be deemed to be a branch of the Supreme Court, and every judge of the Court of Industrial Arbitration shall have the status of a judge of the Supreme Court."

The language of sub-s. 6 requires very careful consideration, for the matters raised in this important appeal depend very largely upon its true construction. The sub-section is as follows: "(6.) Notwithstanding the provisions of any Act limiting the number of judges of the Supreme Court, the Governor in Council may appoint the President or any judge

of the Court to be a judge of the Supreme Court. The President or any judge of the Court, if so appointed as aforesaid, may exercise and sit in any jurisdiction of the Supreme Court, and shall have in all respects and to all intents and purposes the rights, privileges, powers, and jurisdiction of a judge of the Supreme Court in addition to the rights, privileges, powers, and jurisdiction conferred by this Act, and shall hold office as a judge of the said Supreme Court during good behaviour, and be paid such salary and allowances as the Governor in Council may direct, which shall not be diminished or increased during his term of office as a judge of the Supreme Court or be less than the salary and allowances of a puisne judge of the Supreme Court; and upon such direction the said payments shall become a charge upon the consolidated revenue. The President and each judge of the Court of Industrial Arbitration shall hold office as president and judge of the said Court for seven years from the date of their respective appointments, and shall be eligible to be reappointed by the Governor in Council as such President or judge for a further period of seven years."

J. C.
1920
McCawley
v.
THE KING.

On January 12, 1917, a commission was issued by the Governor of Queensland to the appellant, upon the recommendation of the Executive Council, appointing him to be a judge of the Court of Industrial Arbitration, and designating him the President of the Court. The appointment was for the term of seven years from the date of the commission.

The appellant in due course entered upon and began to discharge the duties of judge and President of this Court.

On October 12 of the same year, in pursuance of a recommendation of the Executive Council to that effect, the Governor of Queensland issued to the appellant a commission purporting to appoint him to be a judge of the Supreme Court of Queensland, to have, hold, exercise, and enjoy the said office during good behaviour.

It is important to set out this commission in full. The following were its terms :—

"George the Fifth by the grace of God of the United Kingdom of Great Britain and Ireland and of the British

J. C. Dominions beyond the seas, King, Defender of the Faith,
1920 and Emperor of India :—

McCawley v. THE KING. “To our Trusty and Well-beloved the Honourable Thomas William McCawley, Esquire, President of Our Court of Industrial Arbitration.

“Greeting,

“Whereas by virtue of the provisions of an Act of Parliament of Our State of Queensland intituled the Industrial Arbitration Act of 1916 a Court called the Court of Industrial Arbitration has been constituted : And whereas by virtue of the provisions of the said Act the Governor in Council of Our said State shall by commission in His Majesty’s name, appoint a judge, or judges, not exceeding three in number, of the said Court, and shall designate one of such judges the President of the said Court : And whereas it is further provided by the said Act, that notwithstanding the provisions of any Act limiting the number of judges of Our Supreme Court, the Governor in Council may appoint the President or any judge of the Court to be a judge of Our Supreme Court : And whereas the Governor of Our State of Queensland by and with the advice of the Executive Council of Our said State, has seen fit to direct that you Thomas William McCawley, the President of Our Court of Industrial Arbitration, shall be appointed a judge of Our Supreme Court of Queensland : Now know ye that We, reposing full trust and confidence in your loyalty, learning, integrity and ability, Do by this Our Commission, in pursuance and in exercise of all powers and authorities enabling Us in that behalf, appoint you the said Thomas William McCawley, the President of Our Court of Industrial Arbitration, forthwith to be a judge of Our Supreme Court of Queensland : to have, hold, exercise and enjoy the said office of judge of Our Supreme Court of Queensland during good behaviour together with all the rights, powers, privileges, advantages, and jurisdiction thereunto belonging or appertaining.”

Armed with this commission the appellant presented himself on December 6, 1917, before the Supreme Court of Queensland, and requested the Chief Justice to administer to him the oaths

of office proper to be taken by a judge of that Court. The relators—Feez and Stumm—took objection to the validity of the commission.

J. C.

1920

McCawley

v.

THE KING.

On February 12, 1918, the Full Court gave a considered judgment to the effect that the appellant was not entitled to have the oaths of office administered to him or to take his seat as a member of the Supreme Court.

On March 6 of the same year the appellant took the oath of office and the oath of allegiance proper to be taken by judges of the Supreme Court, in the presence of Judge Macnaughton, Judge of District Courts.

The Full Court, on April 26 of the same year, gave leave to the relators to exhibit against the appellant an information of quo warranto to show by what authority he claimed to be a judge of the Supreme Court. The information so authorized was filed on August 16. It was based upon the grounds which still constitute the main points at issue between the parties. It submitted that the commission of October 12, 1917, was ineffectual for the purpose of appointing the appellant to be a judge of the Supreme Court, for the following among other reasons: (1.) That sub-s. 6 of s. 6 of the Industrial Arbitration Act of 1916 was contrary to the provisions of the Constitution Act of Queensland, 1867 (31 Vict., No. 38, Queensland), and was therefore ultra vires. (2.) That if and so far as the commission of October 12 purported to appoint the appellant as judge of the Supreme Court for life, the Governor in Council had no authority to issue such commission either under sub-s. 6 of s. 6 of the Act of 1916 or otherwise.

The Full Court of the Supreme Court of Queensland (Cooper C.J., Chubb, Shand, and Lukin JJ., dissentiente Real J.) gave judgment in ouster against the appellant on August 22, 1918.

All the members of the Court agreed that the provisions contained in the first two paragraphs of sub-s. 6 of s. 6 of the Act of 1916 were inconsistent with the provisions of the Constitution Act at the moment when the later Act was passed. The majority of the Court held that those provisions were for this reason alone void and inoperative. Real J. held that the

J. C.
1920
McCawley
v.
The King.

provisions under consideration, even though inconsistent with the provisions of the Constitution Act, constituted a legal and effective modification of them.

The appellant appealed to the High Court of Australia against the decision above referred to, and judgment was delivered by that Court on September 27, 1918. Here again there was a conflict of judicial opinion. Griffiths C.J., Barton, Gavan-Duffy and Powers JJ. gave judgment against the appellant. Isaacs, Rich and Higgins JJ. took the opposite view, and were of opinion that the appeal should be allowed. All the judgments dealt exhaustively with the subject, and their research and learning have afforded the greatest assistance to the Board in reaching a conclusion upon the matters submitted to them.

The views of the majority were not entirely harmonious upon the relevant questions.

Griffith C.J. was of opinion that the Parliament of Queensland could not merely by enacting a law inconsistent with the Constitution Act of 1867 overrule its provisions, although it might with proper formality pass an Act which expressly altered or repealed it. He pointed out that the Constitution Act of 1867 had the force of an Imperial statute by virtue of s. 106 of the statute 63 & 64 Vict. c. 12, to this extent, that the constitution of each State was to continue as at the establishment of the Commonwealth until altered in accordance with the constitution of such State. He passed to the conclusion that an attempt to appoint a judge with any tenure of office other than that prescribed by the Act of 1867 was void and inoperative. In his view the appointment authorized by s. 6 of the Industrial Arbitration Act was limited to seven years. He construed the commission as purporting to appoint the appellant for life and, so construing it, reached the further conclusion that the commission itself was bad. Of the other learned judges composing the majority of the Court, some founded their conclusion upon the first of the grounds relied upon by the Chief Justice—namely, that the constitution of Queensland is a fundamental or organic law, which can only be repealed or modified with special formality: others

preferred to base themselves upon the supposed invalidity of the commission in appointing the appellant for life, and thus exceeding its statutory authorization.

J. C.
1920
McCawley
v.
THE KING.

Isaacs and Rich JJ. delivered one of two judgments dissenting from the majority of the Court, and with it their Lordships find themselves in almost complete agreement; indeed, if it were not for the general constitutional importance throughout the Empire of the matters under discussion, they would have been content to leave the matter where these learned judges left it. The circumstances, however, make it proper that they should attempt some examination of the matters which have been argued before them.

They will address themselves to this task after noting that Higgins J., who also dissented, formed the view that upon the true construction of s. 6, sub-s. 6, of the Industrial Arbitration Act the executive was authorized to issue a commission to the appellant, appointing him a judge of the Supreme Court for life during good behaviour. This conclusion rendered it unnecessary for the learned judge to examine the constitutional question, which was so much discussed by his colleagues, with the same degree of elaboration. He agreed that the commission in fact issued constituted such an appointment, and held that the commission was, therefore, valid. He held, moreover—sharing upon this point the views of Isaacs and Rich JJ.—that if, contrary to his view, s. 6 of the Industrial Arbitration Act authorized an appointment for seven years only, that section was nevertheless valid by reason of s. 5 of the Colonial Laws Validity Act.

This short statement of the facts is sufficient to illustrate the issues which have risen between the parties, and which require decision by the Board.

The respondents in effect contend that the Industrial Arbitration Act was in conflict with the Constitution Act of 1867, inasmuch as it purported to authorize the appointment of a judge for seven years only: that having regard to the special character of the earlier Act, it had not been varied with the formality and in the manner requisite under the constitution; and that there was a variance between s. 6 of

J. C. the Act of 1916 and the commission issued under that section,
1920 inasmuch as the commission, unlike the Act, purported to
McCawley create the appellant a judge for life ; and so it was argued
v. that the appointment was void upon this ground also.
THE KING.

At one stage of the case it was contended that the appellant was not qualified under the provisions of s. 6, sub-s. 7, of the Act of 1916 ; but this contention was not persisted in before their Lordships, was plainly insupportable, and may be treated as abandoned.

The appellant replies to the objections which still survive by saying that the Act of 1867, though it deals with very important topics, possesses in law no such special constitutional quality as to preclude its amendment by the methods which are appropriate in the case of any other statute ; and that the Act of Parliament under consideration has, in fact, been altered or modified on many occasions under exactly the same circumstances and by the same methods as in the case of the Act of 1916. If this view be rejected, the appellant further insists that s. 6, sub-s. 6, of the Industrial Arbitration Act was a valid exercise of the legislative power of the State of Queensland by reason of s. 5 of the Colonial Laws Validity Act, 1865.

Upon the other points he contends : (1.) That the Act of 1916 contemplated and authorized the appointment for life as a judge of the Supreme Court of a person in the position of the appellant, and, therefore, that there was no discrepancy between the terms of the Act and the terms of the commission founded upon the Act. This contention, though never abandoned, was not very resolutely pressed ; the reason given being that it was premature to decide now whether or not the appellant held his office for life, inasmuch as the question which actually required decision was whether or no the judgment of ouster could be justified at the moment when it was given. (2.) That if the Act of 1916 contemplated that the appellant should hold the office of judge of the Supreme Court only as long as he continued to be judge of the Industrial Court, the language of the commission was not, rightly understood, inconsistent with the language of the Act so construed.

(3.) That even if such inconsistency were established, the commission must be read in the light of s. 12 (a) of the Acts Shortening Act of Queensland (31 Vict., No. 6, Queensland), with the result that its language must be construed as not giving more than the maximum tenure authorized by the statute.

J. C.
1920
McCawley
v.
The King.

Such are the various contentions which in the course of the argument have been advanced, and their Lordships, so far as is necessary, deal with them in order.

The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.

The difference of view, which has been the subject of careful analysis by writers upon the subject of constitutional law, may be traced mainly to the spirit and genius of the nation in which a particular constitution has its birth. Some communities, and notably Great Britain, have not in the framing of constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will possess more experience of the circumstances and necessities amid which their lives are lived. Those constitution framers who have adopted the other view must be supposed to have believed that certainty and stability were in such a matter the supreme desiderata. Giving effect to this belief, they have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the constitution. It is not necessary, and indeed the inquiry would be a long one, to analyse the different methods which have been adopted in different countries by those who have framed constitutions under these safeguards. But it is important to realize with clearness the nature of the distinction. It is not a distinction which depends in the least upon the

J. C.
1920
McCawley
v.
The King.

differences between a unitary and a federal form of Government. The dictum, for instance, of Isaacs and Rich JJ. that "nowhere do we find in any unitary form of government a provision that the constitutional law must always first be amended" is, if their Lordships understand it aright, too widely stated. Unitary forms of government have, on the contrary, exhibited both ingenuity and resource in providing complicated machinery which required adjustment before the nature of the constitution could be effectively modified.

Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled constitution as by any other nomenclature. Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject-matter.

The fundamental contention of the respondents in this appeal requires the conclusion that the constitution of Queensland is in the sense explained above a controlled constitution. The inquiry ought not to be, and in fact is not, a very difficult one; and it is proposed shortly to examine the principal points which arise; but it is important at the outset to notice

that the respondents do not find themselves in the position which they would occupy under any genuinely controlled constitution with which their Lordships are familiar. In such a case, confronted with the objections by which they are met in this appeal, they would have no difficulty in pointing to specific articles in the legislative instrument or instruments which created the constitution, prescribing with meticulous precision the methods by which, and by which alone, it could be altered. The respondents to this appeal are wholly unable to reinforce their argument by any such demonstration. And their inability has involved them in dialectical difficulties which are embarrassing and even ridiculous. They are, for instance, driven to contend—or at least they did in fact contend—that if it were desired to alter an article of the constitution it was in the first place necessary to pass a repealing Act; and in the second place by a separate and independent Act to make the desired change effective. Counsel for the respondents, in fact, though perhaps unnecessarily, went so far as to maintain that the attempted modification would not be effectively carried out by a single Act, even if such an Act incorporated the provisions of the two Acts which, in his view, required a separate existence.

Their Lordships prefer, however, to consider the matter in a manner more favourable to the respondents; and it would appear that their proposition may be more moderately stated in the following way. The constitution of Queensland is a controlled constitution. It cannot, therefore, be altered merely by enacting legislation inconsistent with its articles. It can only be altered by an Act which in plain and unmistakable language refers to it; asserts the intention of the Legislature to alter it; and consequentially gives effect to that intention by its operative provisions.

It must at once be observed that such a constitution as the respondents conceive of would be, so far as the Board is aware, unique in constitutional history. It is neither controlled nor is it uncontrolled. It is not controlled because posterity can by a merely formal Act correct it at pleasure. It is not uncontrolled because the framers have prescribed to their

J. C.

1920

McCawley

v.
THE KING.

J. C.
1920
McCawley
v.
The King.

successors a particular mode by which, and by which alone, they are allowed to effect constitutional changes.

Their Lordships are clearly of opinion that no warrant whatever exists for the views insisted upon by the respondents, and affirmed by a majority of the judges in the Courts below. It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people what was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation.

An examination of the various statutes which are relevant to the matter renders this conclusion, in the opinion of the Board, certain.

The first document which requires consideration in this connection is the Order in Council of June 6, 1859, empowering the Governor of Queensland to make laws and to provide for the administration of justice in the Colony. This Order in Council was made pursuantly to s. 7 of the Act 18 & 19 Vict. c. 54. The section is referred to hereafter. Clause 1 of the Order in Council provided that there should be within the Colony of Queensland a Legislative Council and Legislative Assembly.

Clause 2 must be set out in full: "II. And it is hereby declared and ordered that within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Council and Assembly to make laws for the peace welfare and good government of the Colony in all cases whatsoever. Provided that all bills for appropriating any part of the public revenue for imposing any new rate tax or impost subject always to the limitations hereinafter provided shall originate in the Legislative Assembly of the said Colony."

Clause 14 was as follows: "XIV. The provisions of the before-mentioned Act of the fourteenth year of Her Majesty chapter fifty-nine and of the Act of the sixth year of Her Majesty chapter seventy-six entitled 'An Act for the Government of South Wales and Van Diemen's Land' which relate to the giving and withholding of Her Majesty's assent to bills

and the reservation of bills for the signification of Her Majesty's pleasure thereon and the instructions to be conveyed to Governors for their guidance in relation to the matters aforesaid and the disallowance of bills by Her Majesty shall apply to bills to be passed by the Legislative Council and Assembly constituted under the said Act of the Legislature of New South Wales and this Order and by any other legislative body or bodies which may at any time hereafter be substituted for the present Legislative Council and Assembly."

Clauses 15, 20 and 22 should be particularly set out.

"XV. The provisions of the said last-mentioned Act respecting the commissions removal and salaries of the judges of the Supreme Court of New South Wales shall apply and be in force in the Colony of Queensland so soon as a Supreme Court shall be established therein."

"XX. All laws statutes and ordinances which at the time when this Order in Council shall come into operation shall be in force within the said colony shall remain and continue to be of the same authority as if this Order in Council had not been made except in so far as the same are repealed and varied hereby and all the Courts of civil and criminal jurisdiction within the said colony and all charters, legal commissions powers and authorities and all offices judicial administrative or ministerial within the said colony respectively except so far as the same may be abolished altered or varied by or may be inconsistent with the provisions of this order shall continue to subsist as if this order had not been made unless and until other provision shall be made as to any of the matters aforesaid by Act of the Legislature of Queensland but so that the power of the Governor of New South Wales in relation to the matters aforesaid shall (except as hereinbefore provided) be vested in the Governor of Queensland."

"XXII. The Legislature of the Colony of Queensland shall have full power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in Council in the same manner as any other laws for the good government of the colony except so much of the same as incorporates the enactments of the fourteenth year of Her

J. C.
1920
McCawley
v.
THE KING.

J. C.
1920
McCawley
v.
THE KING.

Majesty chapter fifty-nine and of the sixth year of Her Majesty chapter seventy-six relating to the giving and withholding of Her Majesty's assent to bills and the reservation of bills for the signification of Her Majesty's pleasure and the instructions to be conveyed to Governors for their guidance in relation to the matters aforesaid and the disallowance of bills by Her Majesty. Provided that every bill by which any alteration shall be made in the constitution of the Legislative Council so as to render the whole or any portion thereof elective shall be reserved for the signification of Her Majesty's pleasure thereon and a copy of such bill shall be laid before both Houses of the Imperial Parliament for the period of thirty days at least before Her Majesty's pleasure thereon shall be signified."

It has already been pointed out that the Order in Council was made under the authority of the 18 & 19 Vict. c. 54, s. 7. This section authorized in terms the Order in Council and contained the following provision: "Full power shall be given in or by such letters patent or Order in Council to the legislature of the said colony to make further provision in that behalf." In order that the importance of the words "full power" and "further provision" should be appreciated, it is important to recall that the Order in Council provided by clause 22, already set out, that "The Legislature of the Colony of Queensland shall have power and authority from time to time to make laws altering or repealing all or any of the provisions of this Order in Council in the same manner as any other laws for the good government of the colony."

It is evident, therefore, that s. 7 of the 18 & 19 Vict. c. 54, was intended to authorize an Order in Council which should give, or which might give, to the Legislature of the Colony powers unrestricted, within the ambit relevant to the present discussion. Wider words could hardly be conceived than those of s. 7. The Order in Council was authorized "to make provision for the government of such Colony, and for the establishment of a Legislature therein." Those who drafted the Order in Council made, in clause 22, full, but not excessive, use of the powers conceded to them by s. 7 of the Imperial Act.

Their Lordships are unable to conceive how real doubt can exist as to the meaning of the language used.

But although the matter would seem to the Board to be extremely plain, it is none the less evident that in this, and in other comparable cases, doubts did in fact arise. Narrow constructions were placed by colonial judges upon the instruments creating constitutions in colonial Legislatures. Causes of friction multiplied, and soon a conflict emerged, analogous to that which is the subject of discussion to-day, between those who insisted that the constitutions conceded to the colonies could be modified as easily as any other Act of Parliament, and those who affirmed that the statute defining such constitutions was "fundamental" or "organic" and that therefore the constitution was controlled. These controversies became extremely grave, and were reflected in an opinion, cited in the course of the argument and given in 1864 by the law officers of the day, Sir Roundell Palmer and Sir Robert Collier. These distinguished lawyers were of opinion, and the Board concurs in their view, that when legislation within the British Empire which is inconsistent with constitutional instruments of the kind under consideration comes for examination before the Courts, it is unnecessary to consider whether those who were responsible for the later Act intended to repeal or modify the earlier Act. If they passed legislation which was inconsistent with the earlier Act, it must be presumed that they were aware of, and authorized such inconsistency. The law officers, however, recognizing that in fact these doubts were genuinely felt by many colonial judges, prudently advised that an attempt should be made finally to solve these difficulties by explanatory legislation. The Colonial Laws Validity Act, 1865, in Imperial history *clarum et venerabile nomen*, had its origin in this opinion. The present litigation has established only too plainly that it has not achieved its purpose. Their Lordships cannot refrain from expressing the opinion that it ought to have done so.

The preamble of the Act, 28 & 29 Vict. c. 63, was as follows :
 "Whereas doubts have been entertained respecting the validity of divers laws enacted or purporting to have been

J. C.

1920

McCawley

v.
THE KING.

J. C.
1920
McCawley
v.
The King.

enacted by the Legislatures of certain of Her Majesty's colonies, and respecting the powers of such Legislatures; and it is expedient that such doubts should be removed: Be it hereby enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows."

Sects. 2 and 3 are as follows: "2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." "3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid."

The important provision, however, of this Act in relation to the present litigation is contained in s. 5, which provides as follows: "Every colonial Legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish Courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative Legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony."

It would indeed be difficult to conceive how the Legislature could more plainly have indicated an intention to assert on

behalf of colonial Legislatures the right for the future to establish Courts of judicature, and to abolish and reconstitute them, than in the language under consideration; nor were the framers of this Act content with making provision for the future. Adhering to their fundamental purpose, which was to remove doubts as to the validity of colonial laws, they affirmed in terms that every colonial Legislature should be deemed at all times to have had full powers in the matters in question.

J. C.
1920
McCawley
v.
The King.

Upon this part of the case their Lordships do not think it useful to expend time upon a more detailed examination of the materials which were so much discussed in the Courts below, and which have been the subject-matter of argument before the Board. In their view it is evident that unless the Act to consolidate the laws relating to the constitution of the colony of Queensland which was passed in 1867 contributed some new and special quality to, or imposed some new and special restriction upon, the constitution of that colony the argument for the respondents upon the matters heretofore discussed wholly fails.

The contention of the respondents is that the Constitution Act of 1867 (namely, 31 Vict., No. 38) enacted certain fundamental organic provisions of such a nature as thereafter to render the constitution stereotyped or controlled. It becomes, therefore, necessary to attempt some examination of the Act in question.

It may be premised that if a change so remarkable were contemplated one would naturally have expected that the Legislature would have given some indication, in the very lengthy preamble of the Act, of this intention. It has been seen that it is impossible to point to any document or instrument giving to, or imposing upon, the constitution of Queensland this quality before the year 1867. Yet their Lordships discern nowhere in the preamble the least indication that it is intended for the first time to make provisions which are sacrosanct, or which at least can only be modified by methods never previously required. The preamble does, indeed, deal with somewhat cognate matters. It recites, for instance,

J. C. the Order in Council of 1859, and, in particular, that part
 1920 of the Order—namely, clause 22—which declared that the
 McCawley Legislature of the colony should have power to make laws
 v. altering or repealing any of the provisions of the Order in the
 THE KING. same manner as any other laws for the good government of
 the colony. It recites further the provisions of 5 & 6 Vict. c. 76,
 ss. 31, 32 and 33, dealing respectively with the giving or
 withholding assent to bills; the disallowance of bills assented
 to; and the assent to bills reserved. The preamble, there-
 fore, gives no indication of intention such as might have
 been looked for if the effect of the Act were such as the
 respondents maintain.

Nor is their case improved by an examination of the sections
 of the Act. Sect. 2 is as follows: "2. Within the said
 Colony of Queensland Her Majesty shall have power by and
 with the advice and consent of the said Council and Assembly
 to make laws for the peace welfare and good government of
 the colony in all cases whatsoever Provided that all bills for
 appropriating any part of the public revenue for imposing
 any new rate tax or impost subject always to the limitations
 hereinafter provided shall originate in the legislative assembly
 of the said colony."

It would be almost impossible to use wider or less restrictive
 language. The colony may make laws for the peace, welfare
 and good government of the colony "in all cases whatsoever."

The next section which requires examination is s. 9, which
 || required a two-thirds majority of the Legislative Council,
 and of the Legislative Assembly, as a condition precedent of
 the validity of legislation altering the constitution of the
 Legislative Council. We observe, therefore, the Legislature
 in this isolated section carefully selecting one special and
 individual case in which limitations are imposed upon the
 power of the Parliament of Queensland to express and carry
 out its purpose in the ordinary way, by a bare majority.

Their Lordships proceed now to consider the language and
 effect of ss. 15 and 16. Those sections are as follows:
 "15. The commissions of the present judges of the Supreme
 Court of the said colony and of all future judges thereof shall

be continued and remain in full force during their good behaviour notwithstanding the demise of Her Majesty (whom may God long preserve) or of her heirs and successors any law usage or practice to the contrary thereof in anywise notwithstanding. 16. It shall be lawful nevertheless for Her Majesty her heirs or successors to remove any such judge or judges upon the address of both Houses of the Legislature of this colony."

J. C.
1920
McCawley
v.
THE KING.

The contention of the respondents upon these sections, shortly stated, is that they embody a judicial charter affording security of judicial tenure; that they cannot be modified except in some manner of which their Lordships take leave to observe that it is neither clearly conceived, nor intelligibly described; that the Act of 1916 is in conflict with these sections; that that Act does not comply with the formalities (whatever they may be) required for the effective modification of the sections; and, therefore, that the Act of 1916 is ultra vires and inoperative.

It does not appear necessary to the Board to undertake any historical examination of the matter; nor is it willing, as it was at one time invited, to form or state a conclusion upon the true construction of the Act of Settlement. It appears sufficient to say that in Great Britain legislation relating to judicial tenure can be altered as easily—so far as form is concerned—as any other legislation. And it is only necessary to add that their Lordships are wholly unable to discern in the language of ss. 15 and 16, or of any other sections in the Act of 1867, the slightest indication of an intention on the part of the Legislature to deal in any exceptional manner with legislation affecting judicial tenure in Queensland.

Still less is the Board prepared to assent to the argument, at one time pressed upon it, that distinctions may be drawn between different matters dealt with by the Act, so that it becomes legitimate to say of one section: "This section is fundamental or organic; it can only be altered in such and such a manner"; and of another: "This section is not of such a kind; it may consequently be altered with as little ceremony as any other statutory provision." Their Lordships

J. C. therefore fully concur in the reasonableness of the observations
1920 made by Isaacs and Rich JJ. that, in the absence of any
McCawley indication to the contrary, no such character can be attributed
v. to one section of the Act which is not conceded to all; and
The King. that if ss. 15 and 16 are to be construed as the respondents
desire, the same character must be conceded to s. 56, which
provides that in proceedings for printing any extract from a
paper it may be shown that such extract was bona fide made.

No attempt has been made in the judgments below, or in the arguments placed before the Board, to deal with the point made by Isaacs and Rich JJ. that if ss. 15 and 16 of the Constitution Act of 1867 are to be construed as depriving the Legislature of the power to legislate upon the subject of the Judicature they are in conflict with the Imperial Act, already referred to, which gives such power in the plainest possible language,

The conclusion of the Board, therefore, upon the matters which have up to the present been considered, is that the main case put forward by the respondents fails. The Act of 1867 has no such character as it has been attempted to give it. The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal.

It follows, therefore, that s. 6 of the Industrial Arbitration Act, 1916, was not ultra vires. The Legislature was fully entitled to vary the tenure of the judicial office. Having reached this conclusion, it would not be necessary for their Lordships to consider whether or not the effect of the Act was actually to alter the tenure, if it were not for the fact that some of the judges below have held, and it has been argued before the Board, that the Act authorized the creation of a judge with a tenure for years, during good behaviour, whereas the commission appointed the appellant a judge for life, during good behaviour. And so it is contended that the commission is bad and that the judgment of ouster appealed against should stand.

•

The relevant sections of the Industrial Arbitration Act of 1916 have already been set out. The effect of s. 6, sub-s. 6, may be shortly restated. The Governor in Council thereby is given power to appoint a President or any judge of the Court of Industrial Arbitration to be a judge of the Supreme Court. So appointed, the President or the judge is to enjoy all the rights and powers of a judge of the Supreme Court in addition to the rights conferred by the Act. He is to hold office as a judge of the Supreme Court during good behaviour.

J. C.
1920
McCawley
v.
The King.

It seems to their Lordships to be impossible to contend that the effect of the provisions, thus generally summarised, can be to authorize the appointment of a person in the position of the appellant to a judgeship in the Supreme Court for life. In the first place, reason and policy would render such a view difficult of adoption. It is intelligible that the Legislature should have desired to throw an atmosphere of judicial prestige around one whose duty it was to compose, or pronounce upon, matters of industrial dissension, for the duration of this important function. But it is extremely difficult to discover any ground of policy likely to have influenced the Legislature to provide that the judge of the Industrial Court should retain his position on the Supreme Court bench for 10, 15 or even 20 years after his arbitral and industrial functions had determined.

The language actually used gives additional weight to these considerations. The persons designated as eligible are described in the terms of the office which makes them eligible. It is the President or any judge of the Court who may become a judge of the Supreme Court. And, moreover, the words which follow state in terms that the person so appointed shall enjoy the rights, etc., of the judge of the Supreme Court "in addition to" his industrial rights. How can he add his rights as a judge of the Supreme Court to his rights as a judge of the Industrial Court if he has ceased to hold the latter position altogether? There is, indeed, on the hypothesis something to add; but there is nothing to which it can be added. The structure and language of sub-s. 6 render, in the opinion of the Board, the conclusion irresistible, that the Legislature

J. C. contemplated that the judge of the Industrial Court should
1920 hold his position as judge of the Supreme Court so long, and
McCawley so long only, as he held the office which provided him with
v. his qualification. The true effect therefore of s. 6 of the Act
THE KING. is to authorize the appointment of a judge of the Supreme
Court for a period of seven years, capable of extension under
the Act, if during that period he is of good behaviour and
retains his office as President or judge of the Court of Industrial
Arbitration.

It is finally contended on behalf of the respondents that, such being the true construction of s. 6, the commission issued to the appellant on October 12, 1917, purporting to appoint him a judge of the Supreme Court of Queensland, is invalid for contrariety having regard to the terms of the Act upon which it is founded.

The terms of the commission have already been set out. It purports to create the appellant a judge of the Supreme Court "to have, hold, exercise and enjoy the said office of judge of our Supreme Court of Queensland during good behaviour, together with all the rights, powers, privileges, advantages, and jurisdiction thereunto belonging or appertaining." These words, it is said, contain no limitation whatsoever. They amount to an appointment for life during good behaviour. The Act of 1916 authorized no such appointment; therefore (such is the argument) the commission was bad.

It would no doubt have been more satisfactory if the Act of 1916 had made it plain in direct and simple language that the specially created judge of the Supreme Court only retained that office as long as he retained the qualifying office. Equally it would have been more satisfactory if the commission had in explicit terms indicated that the appointment therein made was limited in the manner which their Lordships conceive to have been effected by the Act. But at the same time common sense must be applied to the elucidation of these matters. The Act must be construed, as their Lordships have already decided, as authorizing an appointment for seven years (or an extended period) during good behaviour.

The draftsman of the commission was in terms availing himself of the powers contained in that Act. There was neither claimed nor possessed any vestige of right to make such an appointment except pursuant to the Act. The Act was the only soil in which the commission had any root. When the commission therefore makes an appointment under the terms of the Act, and during good behaviour, it means, and can only mean, what the Act means—namely, for seven years (or an extended period) and during good behaviour.

It only remains to add that if, contrary to the view of the Board, the commission were on the face of it excessive, the invalidity would be fully cured by s. 12a of the 31 Vict., No. 6 (Queensland). Sect. 12a is as follows: "Where any Act whenever passed confers power to make grant or issue any instrument, that is to say, any proclamation, Order in Council, order warrant, letters patent, commission, rules, regulations or by-laws, expressions used in the instrument shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power."

On all these grounds their Lordships are of opinion that the appeal should be allowed, the judgments of the High Court of Australia and the Supreme Court of Queensland set aside and the demurrer allowed. They will humbly advise His Majesty accordingly.

J. C.

1920

McCawley
v.
The King.

Solicitors for appellant: *Freshfields & Leese.*

Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

Solicitor for intervener: *Treasury Solicitor.*

J. C.*

[PRIVY COUNCIL.]

1920

March 18.

THE SVITHIOD.

ON APPEAL FROM THE PRIZE COURT, NOVA SCOTIA.

Prize Court—Neutral Ship—Enemy Stowaway—Unneutral Service—Absence of Facts justifying Condemnation.

A Swedish ship, on a voyage from Buenos Ayres to a Danish port, took on board at Pernambuco with the connivance of the captain a German stowaway who was a qualified third officer in the German mercantile marine. He was discovered at Halifax (N.S.) after the captain had made some attempt to conceal his presence on board. There was no evidence that the stowaway was carried at the expense of the German Government, or that he intended to go to Germany. The captain had on board a small parcel of contraband goods which he was carrying as a venture of his own. The Prize Court at Halifax condemned the vessel:—

Held, without defining the circumstances in which a neutral ship may be condemned for the performance of an unneutral service in the carriage of an enemy passenger, that no unneutral service was performed and that the ship was improperly condemned.

Judgment of the Prize Court reversed.

APPEAL from so much of a judgment of the Exchequer Court of Canada, Nova Scotia Admiralty District (in Prize), dated December 11, 1918, as decreed the confiscation of the Swedish ship *Svithiod*.

The circumstances under which the *Svithiod* was condemned appear from the judgment of their Lordships.

The action was tried by the local Judge of Admiralty, Drysdale J., whose judgment with regard to the ship was as follows:—"I am satisfied that the captain of this ship was in collusion with the people in Pernambuco, and I am satisfied that he took the third officer intending to smuggle him to Germany. Of course, he says that when he came to Halifax he had this third officer on board without knowing it. I do not believe him. I am satisfied he came into Halifax with the third officer of the German boat that was interned, bringing him knowingly, and I think myself that the captain of the *Svithiod*

* *Present*: LORD SUMNER, LORD PARMOOR, THE LORD JUSTICE-CLERK, and SIR ARTHUR CHANNELL.

lied when he said that he did not know that he had the third officer on board. I think that that alone cost his owners his ship. Looking over the whole situation, I would not have charged the owners with confiscation unless I was sure that the captain was guilty. The ship was engaged at the time of seizure in an unneutral act. She was properly seized and must, I think, be confiscated."

The learned judge also condemned two bags of rubber, absolute contraband, the property of the captain, observing: "For carrying the contraband rubber alone I would not have confiscated the ship, but considering both circumstances, the ship will be forfeited and the rubber confiscated." There was no appeal from the condemnation of the rubber.

1920. March 16, 17. *Sir Erle Richards K.C.* and *Pilcher* for the appellants. The facts of this case do not amount to an unneutral service justifying condemnation: *The Friendship* (1); *The Orozembo*. (2) [Reference was also made to *Wheaton* (Dana's ed., 1866), para. 502 and note 228, pp. 639 to 642; *Bernard's Neutrality of Great Britain during the American Civil War* (1870), pp. 223 to 225; *Admiralty Manual* (ed. 1888, Holland), p. 18; *Westlake*, 2nd ed., Part 2, p. 302; *Hall*, 7th ed., pp. 739, 740n., 741n., 750n.; *The Nigretia* (3); *Proceedings of Int. Naval Conference* (Miscellaneous Papers, No. 5 of 1909, Cd. 4555), p. 103; *Declaration of London*, 1909, arts. 45, 46; *German Prize Code* (Huberich & King, 1915), art. 48; *American Jo. of Int. Law, Sup.*, vol. x., p. 427.] Cases in which official dispatches were being carried are not relevant. Formerly a belligerent could not remove a person improperly carried, and it was necessary to bring the ship before a Prize Court; there is now an accepted practice enabling removal. There was no evidence that *Hellman* was proceeding to Germany, but it is not material, because the doctrine of continuous voyage does not apply to the case of a passenger, or at least only does so in the case of a person who would be of assistance to the belligerent in his belligerence, which was

J. C.
1920
THE
SYTHIOD.

(1) (1807) 6 C. Rob. 420.

(2) (1807) 6 C. Rob. 430.

(3) (1905) 2 Russ.-Jap. P. C. 201.

J. C.
1920
THE
SVITHIOD.

not shown to be the case: Westlake's *Introd. to Takahashi's Int. Law in Chino-Japanese War*, pp. xxii. et seq., Lord Russell's *Despatch*, Jan. 10, 1862 (see *Bernard* p. 213). The evidence does not establish that the captain was a party to Hellman being taken on board, though it is conceded that the captain did not at first tell the truth when questioned at Halifax. But neither those facts, nor the fact that he had a small parcel of contraband of his own, can make an unneutral service of that which apart therefrom was not an unneutral service.

Sir Hugh Fraser (with him *Sir Gordon Hewart A.-G.*) for the respondent, the Proper Officer of the Crown. The evidence showed (1.) that Hellman was a German subject, and that he was going to Germany, (2.) that the master connived at Hellman being on board, and made a false statement intended to conceal his presence, (3.) that the master was carrying contraband and had false papers stating that it was ship's stores. Under the cumulative effect of the evidence the ship was rightly condemned: *The Kim*. (1) The case falls within the principle of those referred to in the note to *The Caroline*. (2) In those cases the ships were carrying dispatches, but would not have been condemned but for the false statements made by the master. Carrying contraband under false papers and with concealment is a ground of confiscation: *The Hakan* (3); *Carrington v. Merchants' Insurance Co.* (4) The owner is answerable in prize proceedings for the acts of the master: *The Mercurius* (5); *The Vrouw Judith* (6); *The Mars* (7); *The Rosalie and Betty* (8); *The Kim*. (9) At the time of the decisions of Sir William Scott with regard to the carrying of belligerents there was a clear distinction between military persons and civilians. Modern conditions, which make every person of military age a potential combatant, should now be considered in applying the early cases. [Reference was also made to *Oppenheim's International Law*, vol. ii., pp. 517,

(1) [1915] P. 215, 250, 251.

(2) (1808) 6 C. Rob. 461.

(3) [1918] A. C. 148, 152.

(4) (1834) 8 Peters, 495.

(5) (1798) 1 C. Rob. 80, 84.

(6) (1799) 1 C. Rob. 150, 151.

(7) (1805) 6 C. Rob. 79, 81.

(8) (1800) 2 C. Rob. 343, 359.

(9) [1915] P. 215, 265.

522; Dana's Wheaton, p. 643; and the Order in Council of July 7, 1916, whereby the partial adoption of the Declaration of London was withdrawn.]

Sir Erle Richards K.C. in reply. No authority has been produced which covers this case. False papers and false statements do not of themselves constitute an offence, though they are material in drawing inferences of fact: *The Kim* (1); *Hobbs v. Henning* (2); *The Pizarro*. (3) Here no fact can be inferred which establishes an unneutral service. The owner is not liable for an act of the master entirely outside the scope of his authority: *Pratt's Story*, p. 71.

J. C.
1920
THE
SVITHIOD.

March 18. The judgment of their Lordships was delivered by

LORD SUMNER. Their Lordships are much indebted to counsel on both sides for the unusually complete and exhaustive survey of all possible authorities bearing on a most important question, but, for reasons which their Lordships will briefly state, they do not think it necessary to deal with this case in such a manner as would require that time should be taken for its further consideration.

The case is one in which there is no appeal by the captain against the confiscation of the rubber which was his property. The learned local Judge in Admiralty, Drysdale J., has expressly said that for carrying the contraband rubber alone he would not have confiscated the ship, and that, although the captain of the *Svithiod* lied in certain particulars, that alone would not cost his owners their ship; and accordingly the case, although it has involved some discussion as to both the prevarication and falsehood of the captain, and his conduct in having on board some contraband, really resolves itself, and always has resolved itself, into the question whether the captors made out, or laid the foundation for making out, a case of unneutral service.

Upon that the evidence briefly stands as follows. There was a German stowaway, named Hellman, on board the vessel found at Halifax. Their Lordships will assume that, as the

(1) [1915] P. 215, 265.

(2) (1865) 34 L. J. (C. P.) 117, 122.

(3) (1817) 2 Wheat. 227, 241.

J. C.
1920
THE
SVITHIOD.

learned trial judge found, this stowaway was taken on board in collusion with the captain of the vessel, although it may be pointed out that this is rather a matter of indirect inference from the probabilities of the case than dependent upon any fact positively deposed to. This person was the third mate of the *Blücher*, which had taken refuge in Pernambuco at the beginning of the war to avoid the risks of capture at sea, and had remained there for the best part of three years. Hellman came on board and purported to be a stowaway, and purported to discover himself when the ship was a sufficient length of time out of Pernambuco, and was then treated by the captain of the *Svithiod* with some consideration, and so the vessel reached Halifax. The vessel was a Swedish vessel, bound with a full cargo of maize from Buenos Ayres to a port of discharge in Denmark. The learned trial judge found that he was satisfied that the captain took the third officer intending to smuggle him to Germany. In their Lordships' opinion, that, however plausible as a matter of speculation, on this evidence is a matter of speculation only; because all that can be said is, on the one hand, that he was a German, and apparently that his relations were still alive in Germany, while, on the other hand, there is no evidence of any express intention on his part, or of anything done by him to throw any light on his further proceedings after arriving in Denmark; and for what it may be worth there is the fact that he had left Pernambuco under such circumstances of dispute with the other officers on board his ship, the *Blücher*, that the immediate cause of his discovery was in fact the sending of a letter by the first mate, which he must have known would fall into the hands of the British officials, betraying Hellman's presence on board, because he had gone away in debt to him and others. Therefore, it would be quite impossible, in their Lordships' opinion, to say that it has been proved that he was even going to Germany. What this man was, except that he was a mariner and a qualified third officer, the evidence does not show; and even assuming, as probably one may assume, because our eyes cannot be closed to circumstances of public notoriety connected with the war, that, if he reached Germany, some

service in connection with the war would promptly have been found for him, the fact remains that he was at the time a seaman in an entirely private capacity seeking the opportunity of a voyage, by which he would at least escape from a further stay at Pernambuco, and proceeding at his own expense, or at the expense of the owners of this Swedish barque, it does not appear which, but without their cognizance at any rate. His case, therefore, cannot be placed in the same category at all as the cases where the officers of a belligerent State have engaged a vessel to perform a particular service, or have paid for the carriage of particular passengers, or where persons, already embodied in the service of the belligerent country, are being transported upon some purpose of State.

Their Lordships are impressed with the fact that the circumstances of this case appear to lie outside the scope of any authority to which their attention has been drawn. It is true that when he reached Halifax the captain of the *Svithiod* endeavoured to conceal the presence of the man on board by means of very transparent devices, because, as he knew almost as soon as he was interrogated, the officials were already aware of the man's presence, and anything he might say or do could hardly do more than save appearances for himself, and enable him to say that he had not given the man up. The conduct of the captain of the *Svithiod* does not appear to their Lordships particularly aggravated. At any rate, if there is no sufficient evidence of an act which would constitute an unneutral service or a cause of condemnation under that or any analogous title, the mere deceptions of the captain of the *Svithiod* in themselves would not, either in justice or according to authority, be a ground for confiscating the vessel.

Their Lordships are, of course, very fully impressed with the great importance of the whole topic of unneutral service, particularly in view of the fact that the change in the circumstances under which maritime warfare is now carried on is so great since most of the cases relied upon were decided. On some proper occasion it might be necessary to define with very great accuracy the way in which well-known principles should be applied under modern conditions; but it is precisely

J. C.
1920
THE
SVITHIOD

J. C.
1920
THE
SVITHIOD.

because their Lordships are so impressed with the importance of the subject, with the high obligations which rest upon neutrals to refrain from all unneutral service, and with the gravity of that breach of duty, if it should occur, that they think it unnecessary, and therefore inexpedient and undesirable, to endeavour to decide any question of law in a case where, in their view, the captors have failed to lay any foundation in fact which would justify the investigation of so important a subject.

Their Lordships will, therefore, humbly advise His Majesty that the appeal succeeds; that the decree of confiscation ought to be set aside, and that the confiscated vessel ought to be restored to her owners. The respondent will pay the costs of the appeal.

Solicitors for appellants : *Botterell & Roche.*

Solicitor for respondent : *Treasury Solicitor.*

J. C.*
1920
April 30.

[PRIVY COUNCIL.]

THE ORTERIC.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Enemy Goods—Passing of Property after Seizure—"Sale" of Draft to Bankers.

Goods which at the date of their seizure in prize are not enemy property cannot be condemned as enemy goods, although the property in them has passed to an enemy before the issue of the writ claiming condemnation.

The Schlesien [1916] P. 225 distinguished.

A shipper of goods deliverable to his order who sells to bankers a draft on the buyers for the price in a foreign currency, with the bill of lading and policy indorsed and attached, does not thereby indicate an intention to pass the property in the goods to the bankers.

Judgment of the Prize Court reversed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize) (1), dated February 11, 1918, condemning

*Present : LORD SUMNER, LORD PARMOOR, LORD WRENBURY, and SIR ARTHUR CHANNELL.

(1) Unreported.]

as enemy goods 32,000 bushels of wheat, part of the cargo of the British steamship *Orteric*.

The facts of the case and the grounds upon which the President (Sir Samuel Evans) condemned the wheat appear from the judgment of their Lordships.

J. C.
1920
THE
ORTERIC

1920. March 12, 15. *Sir Erle Richards K.C., Dunlop K.C.* and *Dumas* for the appellant. Acceptance of the draft by the buyers was a condition to the passing of the property to them: Sale of Goods Act, 1893, s. 19; *Shepherd v. Harrison*. (1) There was no acceptance. If the documents were handed to the buyers in Hamburg it was without the appellant's consent, and therefore he could not thereby be divested of his property. But in any case, the evidence does not show that the documents arrived in Hamburg until August 25—namely, after the seizure. The date at which the enemy character of the goods has to be established is that of the seizure: *The Prinz Adalbert* (2); *The Miramichi* (3); *The Frogner*. (4) Further, the bill of lading became invalid on the outbreak of war; no property therefore could pass by reason of it being handed to the buyer: *Karberg's Case*. (5)

J. G. Pease (with him *Sir Gordon Hewart A.-G.*) for the respondent, the Procurator-General. The documents arrived in Europe on August 5, 1914, and the probability is that they reached Hamburg and were tendered to the buyer before August 22, when the seizure was made. The buyers received the documents, and apparently indorsed the bills of lading; the property passed to them. Even if that took place after the seizure the wheat was properly condemned, there being a continuous seizure: *The Schlesien*. (6) Further, both the appellant and the New York bank agreed in treating the sale of the draft as a purchase of the wheat by the bank; the appellant is therefore precluded from claiming.

Sir Erle Richards K.C. in reply. *The Schlesien* (6) is

(1) (1871) L. R. 5 H. L. 116.

(2) [1917] A. C. 586.

(3) [1915] P. 71, 77.

(4) [1919] P. 127.

(5) [1916] 1 K. B. 495.

(6) [1916] P. 225.

J. C.
1920
THE
ORTERIC.

distinguishable. In that case a fresh writ was issued, and there was a constructive fresh seizure. Moreover, that was not a case of the property passing, but of the owners becoming enemies. *The Palm Branch* (1) shows that a fresh seizure is necessary. [Reference was also made to *The Kronprinzessin Cecilie* (2) and *Procurator in Egypt v. Deutsches Kohlen Depot*. (3)].

April 30. The judgment of their Lordships was delivered by

LORD SUMNER. The claimant is a British subject, carrying on business at Galveston, Texas, U.S.A. On July 22, 1914, he sold to Eicholz and Loeser of Hamburg 32,000 bushels of wheat at a price reckoned in gold reichsmarks, "payment in Hamburg by net cash in exchange for shipping documents." By the terms of the contract it was "deemed to have been made in England, and to have been performed there." The seller had no anticipation of war at the time.

The wheat was shipped on board the British steamship *Orteric*, under bills of lading dated July 24, 1914, making the wheat deliverable to shipper's order. The claimant duly indorsed them in blank. Insurance was effected with the Union Marine Insurance Company of Liverpool, through their New York branch. The claimant drew at eight days' sight on Eicholz & Loeser for the contract price in reichsmarks, attaching the certificate of insurance and the bills of lading, and, wishing not merely to collect money forthwith but to collect it in dollars, he "sold" the draft with documents attached through a firm of brokers to the National City Bank of New York, indorsing it specially to that bank. The brokers' "contract of exchange" describes this transaction as a "sale." The claimant rendered an invoice to the National City Bank for the amount of the draft less 1/32nd, in dollars at a rate of exchange of 95, and drew a sight draft on them for that amount, which was duly paid. The first question in the case is whether this transaction was a sale in any sense.

The *Orteric* sailed for Hamburg before the outbreak of war,

(1) [1919] A. C. 272.

(2) [1919] A. C. 964.

(3) [1919] A. C. 291.

and on passage was diverted to Liverpool, where the wheat was seized. The Crown ought to have proved the date of this seizure, for it was very material, but did not do so. It was, however, stated at the trial that the seizure took place on August 22, 1914, and this date the claimant accepted. The wheat was afterwards condemned by Sir Samuel Evans as enemy property.

The National City Bank of New York indorsed the draft to the Norddeutsche Bank in Hamburg on July 28, 1914, and forwarded it, per the steamship *Savoie*, to that bank with the documents, for collection for account of the Direction der Disconto-Gesellschaft of Berlin, the documents to be delivered to the drawees against payment. A special authority was added in the following terms: "You are hereby authorized, if requested to do so, to give a guarantee on our behalf to deliver to interested parties, if entitled thereto by reason of acceptance or payment, the remaining bills of lading when received." These duplicate bills of lading went forward by the *Carmania*. The Disconto-Gesellschaft of Berlin was advised of this remittance of the documents to Hamburg "for the favour of collection and credit of our account with your good selves." In due course the *Savoie* reached Havre on August 5, and the *Carmania* reached Liverpool on August 7, 1914.

What happened in Hamburg is the second question in the case, and there is a good deal of dispute as to the facts and more particularly as to the date when those facts occurred. Eventually the draft and bills of lading came back to the National City Bank of New York. The draft was unpaid and unaccepted; the bills of lading had on the back of them something elaborately obliterated with black pigment. Beyond any real doubt that something was the indorsement of Eicholz & Loeser. After an interval, the bank sent these documents to the present claimant, and called on him to pay the draft, but never pressed their demand. He has neither paid nor been sued.

Certain letters are forthcoming from Eicholz & Loeser to the claimant and from the Disconto-Gesellschaft of Berlin to

J. C.
1920
THE
ORTERIC.

J. C.
1920
THE
ORTERIO.

the National City Bank of New York. If the story they tell is true, the effect of it is this. Eicholz & Loeser had resold the wheat in four parcels, three to sub-purchasers in Hamburg and the fourth to a sub-purchaser in the interior of Germany. When they applied to them to know whether they would take up the documents, these persons in Hamburg, who probably had a very shrewd idea that they would never see the wheat, prudently replied that they would take them up when the wheat arrived. The fourth was telegraphed to but did not answer. It is consistent with these letters that Eicholz and Loeser were asked by the Norddeutsche Bank to accept the draft and made the above inquiries on one and the same day—namely, August 25. It is improbable that three days had elapsed between the presentation of the draft for acceptance and that date. Eicholz & Loeser say that the documents only arrived in Hamburg on August 25, and then were handed to them by the Norddeutsche Bank but were not taken up by them, and that they were then presented to the sub-purchasers. To make this presentation regular Eicholz and Loeser, as they say, indorsed the bills of lading. Whether this was done by arrangement with the Norddeutsche Bank does not appear. In any case it was superfluous, for the bills of lading were already indorsed in blank. When the sub-purchasers refused or failed to take up the documents, the indorsement of Eicholz & Loeser was obliterated, and the bills of lading were returned to the bank.

The proceedings before the Prize Court, instituted by a writ dated September 18, 1914, form the conclusion of these transactions. The first to claim in prize were the National City Bank of New York, alleging that they owned the wheat. They supported their claim by inconsistent and contradictory affidavits. Their claim failed, and they do not now appeal. The appellant did not appear until nearly two years after the issue of the writ, and about seven months later he delivered his claim, alleging that the wheat was his. A passage from his evidence was much relied on for the Crown. It is as follows: “Q. You considered, did you not, the documents belonged to the National City Bank of New York?—A. Yes,

only as a rule, when you sell documents and indorse them, you are supposed to be back of them. *Q.* Certainly. In other words, you were subject to your liability as indorser in case the drafts were dishonoured and not paid?—*A.* Yes, sir. *Q.* But your transaction with the National City Bank was intended to be an absolute sale of the documents?—*A.* Certainly. . . . *Q.* You don't know what authority . . . may have been given by the National City Bank of New York to its correspondent in Germany?—*A.* No. In the usual course of events, when you part with those documents, you have said 'good-bye' to the transaction."

The learned President, the late Sir Samuel Evans, relying on this passage among other circumstances, held that the appellant "never had any intention to reserve any property or interest in the wheat after he parted with the documents to the National City Bank of New York"; that the Bank were pledgees only, and that "the property had before the seizure passed to the German buyers." Plainly, therefore, not only the passing of the property but the date on which the property passed were considerations germane to his conclusion that the wheat should be condemned.

Where, as in the present case, cargo is seized and a decree is asked that such cargo "belonged at the time of capture and seizure thereof to enemies of the Crown and as such is subject and liable to confiscation as good and lawful prize," the question before the Court is whether what was seized in prize was good prize—that is, whether the goods did or did not then belong to the King's enemies. This is the crucial date for the case of the captors. On the other hand, the position of things at subsequent dates may affect the claimant's rights, independently of any mere traverse of the captor's claim. Thus a claimant, having succeeded in his contention that what the captors seized was then his property, may fail nevertheless to establish a right to have it released to him, if before he comes before the Court to claim as owner it has become enemy property. He cannot then truly claim the goods as his. In order to obtain the release of the goods to himself, he has to prove that the goods were his when seized, and that

J. C.
1920
THE
ORTERIO.

J. C.
1920
THE
ORTERIC.

he is still the person who, so to speak, can give a good discharge for them if the Court decrees their release to him. In this attempt he has failed, apart from condemnation, if, in fact, they belong to an enemy: *The Prinz Adalbert*. (1) It is in accordance with this principle that before releasing goods to a claimant the Court satisfies itself that no enemy has any title to or interest in them. Many other considerations may affect the question of seizure. The time and circumstances of the alleged seizure may be inquired into in order to decide whether the seizure was valid: *The Roumanian* (2), or to decide whether what passed amounted to a seizure at all: *Procurator in Egypt v. Deutsches Kohlen Depot*. (3) Belligerent rights are not exhausted by a single seizure; if a first seizure should be deemed bad, or its invalidity be apprehended, a second seizure under proper conditions may be made and relied upon. These are the questions which usually make the precise date of a seizure material, but none of these questions arose in the present case. If, as appears to be the fact, the goods did not become enemy goods, if at all, till after August 22, the respondent was driven to contend that, for the purpose of deciding the issue of enemy goods or not enemy goods, the date of the writ will suffice as the material date. For this no authority was produced. Reliance was indeed placed on *The Schlesien* (4), where, the goods seized having been neutral-owned at the date when they were first seized and at the date when a writ in prize was first issued, Sir Samuel Evans held that retention of possession by the Crown might be regarded as a continuous seizure, so that, when the goods had become enemy goods by the outbreak of war with Austria and a second writ had been thereafter issued, the requisites for their condemnation as enemy property were satisfied. If the first seizure was invalid and there was nothing to justify possession except such seizure, a second might be made, when the outbreak of war with Austria made seizure legitimate. The intention of the Crown after the original seizure to hold in the exercise of belligerent rights was found

(1) [1917] A. C. 586.

(2) [1916] 1 A. C. 124.

(3) [1919] A. C. 291.

(4) [1916] P. 225.

as a fact. The mode in which the cargo had been dealt with was not such as to exempt the goods from further seizure. The issue of the writ itself was not merely the expression of the purpose with which the Crown had continued in possession, though there had been no intermediate release, but it was in itself an overt and notorious act which, coupled with due service, might amount to a second and a valid seizure. It is not quite clear that this was Sir Samuel Evans's finding, but, whatever may be thought of this decision if it proceeded on other grounds, it is inapplicable to the present case. Here there is no second writ and no extraneous event at all to affect the status of the goods after the first seizure. The goods were seized once only and were seized as being then good prize, and this they were not if they were still British-owned. If the seizure was wrongful then, it does not become rightful by continuing the wrong. The captor cannot be allowed to benefit by the chance of what may happen while he delays to issue a writ, so that the chapter of events in the meantime may repair what was imperfect in his own proceedings. If the goods had been enemy goods when seized, the captors would not have been defeated by a transfer of the property to a neutral before the writ could issue. If the captors take the goods of a neutral or a British subject by a bad seizure, they must, in order to avail themselves of a subsequent passing of the property to an enemy, make a fresh and valid seizure. Of this there was no vestige here.

In the present case the respondent proves nothing adverse to the claimant's title without either showing that the title to the wheat had been divested in favour of the National City Bank of New York before the decree, or had passed from the claimant and had become vested in Eicholz & Loeser before the seizure. As to the latter he proves nothing unless he relies on the statements made by Eicholz & Loeser in the letters which were put in. These letters say that the documents only arrived in Hamburg on August 25, and on this point at least the letters are self-consistent. The respondent produced nothing to the contrary except that the *Savoie* reached Havre on August 5 and the *Carmania* reached Liverpool two days

J. C.
1920
THE
ORTERIC.

J. C.
1920
THE
ORTERIC.

later. In the circumstances then existing no inference can be drawn as to the date at which letters for Hamburg brought by these vessels would reach their destination. Substantial delay is certain. If the letters arrived on August 25, it may well be that they arrived earlier than might have been expected. Their Lordships are unable to conclude that the documents were in Hamburg by or before the date of the seizure of the wheat—namely, August 22.

Further, in their Lordships' view, it is very improbable that the wheat ever vested generally in the National City Bank of New York, apart from a mercantile pledge, or ever vested in any German owner at all, and they conclude that neither vesting happened. There is no evidence whatever that Eicholz & Loeser or their sub-purchasers ever paid anything. Such evidence as there is goes entirely to the contrary. It was most strongly against the interest of both purchasers and sub-purchasers to part with any money under the circumstances against wheat that had not arrived and might well never arrive. It was contrary to the interests of the Norddeutsche Bank, who were in any case only agents and were acting on the instructions of an important bank in the principal neutral country, to allow the wheat to vest in others, if no money was forthcoming. It is true that the bills of lading were indorsed by Eicholz & Loeser, but the Norddeutsche Bank, which allowed this to be done, also allowed the indorsement to be obliterated—a stupid thing in itself and provocative of objection by third parties—and returned them to America. The statement of Eicholz & Loeser is that most consistent with the probabilities of the case—namely, that for the purpose of getting money from the sub-purchasers, in case they could be prevailed upon to pay, they indorsed and presented the bills of lading without either taking them up or getting possession. In all probability a clerk from the bank kept them all the time, but attended when Eicholz & Loeser went to the sub-purchasers in order to exhibit the bills, ready to be delivered. They never were delivered. He took them back to the bank, and so, with the indorsement obliterated, they were sent back by the bank to New York. The whole

tenor of the letters is quite consistent with the bills of lading never having been delivered to Eicholz & Loeser, in spite of the indorsement, and such is their Lordships' view.

Again it is wholly improbable that the documents were ever taken by the National City Bank of New York except by way of discount and security. Such would be the natural course of business, and as the transaction by which the documents were transferred to them was completed not only before the outbreak of war but even before its imminence became obvious, there was no reason for departing from the natural course. It is plain that when the claimant handed over the documents to the bank he meant his contract of sale to Eicholz & Loeser to be completed by delivery to them of the bills of lading for the wheat. It is plain that all that the bank would get out of the transaction would be eight or nine dollars for discount. They cannot have meant to buy the wheat out and out, and whether their statement that the wheat was their property was really believed by them or not, it is no doubt due to the uncertainty, which may well have existed before the decisions in *The Miramichi* (1) and *The Odessa* (2) as to the kind of ownership which is required to support a claim as owner in prize. As to the expression in the brokers' contract that the draft (not the wheat) was "sold," that is an intelligible, if inaccurate, expression for an exchange transaction, which would commonly be referred to as a sale of reichsmarks and a purchase of dollars.

There remains the above quoted evidence of the claimant, as to which the respondent's argument was that he could not go back from his own evidence, but must be taken at his word. Their Lordships will say nothing to encourage the idea that claimants in prize can be allowed to deal uncandidly with the Court or to modify in their own favour inconvenient admissions made by or binding upon themselves. It is, however, in fairness always necessary to ascertain what the evidence really means, and in this case the strongest light is thrown on the meaning by the familiar character of this type of transaction. In the vast majority of such cases the shipper

J. C.
1920
THE
ORTERIO.

(1) [1915] P. 71.

(2) [1916] 1 A. C. 145.

J. C.
1920
THE
ORTERIC.

does "say good-bye" to the transaction when he parts with the documents and receives the proceeds of the discount of the draft. In substance the documents are absolutely parted with, if not truly sold, for they are never likely to come back. Yet all the time the drawer remains "back of" the documents, even when he has "sold" and indorsed them. Their Lordships think that the claimant, with some transatlantic locutions, was intending to describe the usual transaction, in which he would retain the general property and transfer to the bank only a special property by way of security, and that his language should not be further pressed against him. Nor can his case be prejudiced by the ambiguous conduct of the bank in the proceedings, or by their vacillation in asserting against him their claim to recourse on the draft. What rights and remedies may still be outstanding between the claimant and the bank their Lordships do not know and need not inquire. They are of opinion that the wheat never ceased to be the claimant's wheat till it was sold in the course of the proceedings in prize; that he is the owner of the proceeds which represent the wheat, free from any enemy interest; that he is entitled to have the decree of condemnation set aside and the proceeds of the wheat released to him; to have his appeal allowed with costs here and below, and to have returned to him in full his security lodged in the Prize Court. They will humbly advise His Majesty accordingly.

Solicitors for appellant : *Thomas Cooper & Co.*

Solicitor for respondent : *Treasury Solicitor.*

[PRIVY COUNCIL.]

J. C. *

1920

Feb. 17.

LI HONG MI APPELLANT ;

AND

ATTORNEY-GENERAL FOR HONG KONG }
AND OTHERS } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Hong Kong—Deportation Order—British Subject—Want of Particularity in Charge—Deportation Ordinance, 1917 (No. 25 of 1917), s. 4, sub-s. 14.

In proceedings under s. 4 of the Deportation Ordinance, 1917, of Hong Kong, for the deportation of a British subject, the questions addressed under sub-s. 14 (b), and form No. 2, to the person against whom the proceedings are taken, and the order of deportation under sub-s. 14 (11) (13), and Form No. 7, must state a specific offence or misconduct within sub-s. 14 upon some particular occasion.

An order for deportation under s. 4, sub-s. 14, is invalid where form No. 2 and the order for deportation state as the grounds that the person proceeded against has made a practice of champerty and of other named misconduct, and has been guilty of champerty and other named misconduct in two specific suits.

Judgment of the Supreme Court reversed.

APPEAL from a judgment of the Supreme Court of Hong Kong (June 12, 1918).

The judgment appealed from dismissed an action brought by the appellant against the respondents under the circumstances stated in the judgment of their Lordships.

1920. Feb. 26, 27. *Douglas Hogg K.C.* and *Sir Albion Richardson* for the appellant. The deportation order was invalidly made, having regard to the construction of the Deportation Ordinance, 1917. It is conceded that the Governor, with the advice and consent of the Legislative Council, had power to enact an Ordinance even if it affected the common law rights of British subjects : *Rex v. Marais* (1);

* *Present* : VISCOUNT HALDANE, LORD BUCKMASTER, LORD DUNEDIN, and LORD ATKINSON.

(1) [1902] A. C. 51.

J. C. *Rex v. Earl of Crewe* (1); Colonial Laws Validity Act, 1865
 1920 (28 & 29 Vict. c. 63), s. 3. But the Ordinance should not be
 Li Hong Mi construed so as to affect the principles of natural justice unless
 Attorney-General the language used by the Ordinance is clear: *Local Govern-*
 for Hong Kong. *ment Board v. Arlidge*. (2) Sect. 4, sub-ss. 1 and 2, expressly
 refer to the order under that section being made after inquiry
 by the Governor; the fact that under s. 3 there is in certain
 circumstances power to deport summarily, shows that an
 inquiry is an essential condition to the jurisdiction under s. 4.
 That necessarily involves that the person proceeded against
 should be informed what are the precise charges against
 him, so that he may have a fair opportunity to meet them :
Willis v. Gipps (3); *Smith v. The Queen* (4); *Board of*
Education v. Rice (5); *Local Government Board v. Arlidge* (6);
De Verteuil v. Knaggs. (7) Form No. 2 is to include a
 statement of what is alleged against the person proceeded
 against, and having regard to the procedure under the
 Ordinance it is essential that the statement should
 specifically allege the particular misconduct charged. In
 the present case the statement was too vague to enable
 the appellant to deal with the charges. The form of the
 order of deportation in stating the grounds follows the
 wording used in the charge, it is therefore impossible to say
 whether the order was made upon either of the two cases
 specifically charged, or upon the general charges, which the
 appellant had had no proper opportunity to meet.

Upjohn K.C. and *Givven* for the respondents. The action
 was rightly dismissed. By ss. 12, 13, of the Ordinance, the
 order for deportation is conclusive evidence that the order
 was duly and validly made, and the decision of the Governor
 in Council is final. The only remedy open to the appellant
 was by petition through the Secretary of State, to whom
 under s. 14 the making of an order against a British subject
 has to be reported. But in any case the charges were

(1) [1910] 2 K. B. 576.

(2) [1915] A. C. 120, 130.

(3) (1846) 5 Moo. P. C. 379.

(4) (1878) 3 App. Cas. 614.

(5) [1911] A. C. 179, 182.

(6) [1915] A. C. 120, 132.

(7) [1918] A. C. 557, 560.

made with sufficient precision. The words used in question 4 of form No. 2, namely, "it is alleged against you that . . . ,"

do not indicate that the charges are to be stated with great particularity. In the present case two charges were made specifically, and upon the proper construction of the language employed they were particulars of the more general charges stated. The appellant in his answers purported to deal with the particular charges; the statement of a witness whom he vouched in his answers was far from satisfactory. The material before the Board justifies the Governor in finding that the specific charges were true.

J. C.

1920

LI HONG MI
v.
ATTORNEY-
GENERAL
FOR
HONG KONG.

Feb. 17. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Hong Kong, dismissing an action brought by the appellant for a declaration that a deportation order made against him by the Governor of the Colony in Council was invalid, and for damages. The claim for damages has not been pressed, and the only question before the Board is that as to the validity of the order.

This order was made under the powers conferred by the Deportation Ordinance, 1917, passed by the Governor of Hong Kong in Legislative Council. Although Hong Kong is a Crown Colony and the provisions of the Ordinance affect materially the rights of British subjects as they would be under the common law of England, there is no doubt as to the validity of these provisions and the Ordinance enacting them. Under letters patent the Crown had conferred on the Governor power, with the consent of his Legislative Council, to make laws for the peace, order and good government of the colony. It is clear that under a grant from the Crown of such powers the Government of the colony can legislate freely, even to the extent of altering the common law and such statutes of the Imperial Parliament as have not been made applicable to the colony by express words or necessary intendment. This is laid down by the Colonial Laws Validity Act, 1865, which provides, by s. 3, that no colonial law shall be inoperative on the ground of repugnancy

J. C. to the law of England, unless repugnant to a statute
 1920 so made applicable, or to some order or regulation made
 Li Hong Mi under it.

v.
 ATTORNEY- The real question on the appeal is whether the order made
 GENERAL against the appellant conformed to the procedure directed by
 FOR the Ordinance itself. If it cannot be shown to have been in
 HONG KONG. conformity with these provisions, interpreted with the strict-
 ness which is required where the liberty of a British subject is
 concerned, the deportation cannot be justified. Their Lord-
 ships have therefore, in the first place, to turn to the language
 of the Ordinance, and then to consider how it was applied
 to the facts in the case.

The Ordinance, which was passed on October 12, 1917, followed on previous Ordinances directed to the same general purpose, the exclusion and removal from the colony of undesirable persons. It is not surprising that for the mixed and varying population of Hong Kong power to effect this purpose should have been thought desirable. The legislation discriminates between foreign and British subjects, but it covers in different forms both classes. Under s. 3, the Governor in Council may summarily issue a deportation order against any person who commits the offence of being in the colony in breach of a previous deportation order, whether he be a British subject or not. In the case of anyone who, in the opinion of the Governor in Council, is not a British subject, and who has been convicted of an offence in the colony, he also may be summarily deported, and so may any one not being, in the opinion of the Governor in Council, a British subject, and being in the colony during the continuance of any proclamation issued under the Peace Preservation Ordinance, 1886, whom the Governor in Council thinks it desirable in the public interest to deport. The procedure prescribed for the classes of case to which s. 4 of the Ordinance relates is not to apply to cases falling under s. 3, the deportations under which are obviously intended to fall within the administrative powers of the Government, and not to be matters requiring, as under s. 4, a semi-judicial procedure.

Sect. 4 is different in its character. It provides for the issue of a deportation order if, after an inquiry to be made in a prescribed fashion, the Governor in Council is of opinion that such an order should issue. When the Governor thinks that there are reasonable grounds for inquiry as to whether any person should be deported, he may issue a warrant for his arrest and detention for not more than six days. As soon as conveniently may be after the arrest, the Secretary for Chinese Affairs, or one of the other officers specified, is to interview the person so arrested, and is to ask him certain prescribed questions, and to record his answers, to be signed by him if he is willing to do so. The report of the answers is to be transmitted to the Colonial Secretary of the colony. The only one of the questions prescribed that is material for the present purpose is the fourth. It is in a form that begins by setting out what is alleged against the person arrested, and it goes on to ask him whether he has anything to say in answer to the charge, or any reason to give why he should not be deported. When the answer to this question is transmitted with the other answers to the Colonial Secretary, it is to be accompanied by the reports on which the allegations, the subject of this fourth question, were based. By s. 7, the deportation order is to state the grounds on which it is made, and the period during which it is to apply. By s. 13, the decision of the Governor in Council as to whether any person is liable to deportation is to be final and conclusive for all purposes. It is obvious however that this provision can only apply if the terms of the Ordinance have been complied with. By s. 14, a report is to be made to the Imperial Secretary of State on the making of any deportation order against a British subject.

Sub-s. 14 of s. 4 is important, for it provides that the provisions of s. 4 are not to apply at all in the case of a British subject, unless he is (a) a person who, in the opinion of the Governor in Council, has been guilty of "any criminal offence, or of any other misconduct, connected with the preparation, commencement, prosecution, defence or maintenance of any legal proceeding, or the sharing in the proceeds

J. C.

1920

LI HONG MI
v.
ATTORNEY-
GENERAL
FOR
HONG KONG.

J. C. thereof, or the settlement or compromise thereof, or the
 1920 obtaining a preparation of evidence in anticipation thereof
 Li Hong Mi or in relation thereto." There are two other subheads,
 v. (b) and (c) in the sub-section, which relate to and include
 ATTORNEY- offences committed by British subjects in relation to
 GENERAL bankruptcy and analogous matters, and to the registration
 FOR of documents, but neither of these sub-heads is material
 HONG KONG. in the present case.

The appellant, who was a natural-born British subject, had been employed as Government interpreter in the Police and Supreme Courts for many years. He subsequently entered the service of solicitors practising in the colony. On November 2, 1917, the Governor made an order for his arrest and detention for six days. On December 21 the appellant brought the action out of which this appeal arises. On January 15, 1918, the Governor in Council made an order under s. 4, sub-s. 11, of the Ordinance prohibiting the appellant from being within the colony for the space of fifteen years. The grounds on which this order was made were stated in accordance with form No. 7, as required by s. 4, sub-s. 14 (13), to be that the appellant had made a practice of champerty, the institution of fraudulent claims, the preparation of false evidence, the improper exploitation of litigants, and the dishonest conduct of litigation and of the proceedings incidental thereto; and that he had been guilty of the following misconduct: "(a) Champerty, the institution of a fraudulent claim, and the preparation of false evidence, in connection with O.T. action No. 247 of 1913. *Un Tak-kwong v. Un Ting Tsun*. (b) Champerty and the improper exploitation of litigants in connection with O.T. action No. 105 of 1912. *Ho Chiu-lam v. Ho Ngok-Lau*."

The statement of claim in the action was delivered on March 7, 1918.

The charges which formed the allegations on which question 4, already referred to, was based, included a further charge as to misappropriation of money collected for costs in another action, but this proved to be unfounded and was not pressed.

The question raised in these proceedings, and the only question on which their Lordships have entertained doubt, is whether it was competent to introduce as one of the charges, and as a ground for the order of deportation, the sweeping allegation that the appellant had made a general practice of champerty, and the other kinds of misconduct charged. It is true that this is followed by two specific instances of champerty and other misconduct, and if these had been given as examples of the general charge, their Lordships do not doubt that upon the explanation proffered being held insufficient, a deportation order could have been pronounced. But it is impossible so to treat this charge; for not only is the general allegation expressed as cumulative to the two particular cases charged in distinction from them as a separate head of charge, and numbered as distinct from the other charges, but in the order itself it is introduced as a separate and distinct ground. If, therefore, by the provisions of the Ordinance a charge is inadmissible in such a form as a ground for making the order, the order itself is vitiated, because it is impossible to say how far the introduction of an inadmissible reason may not have affected the minds of the Governor and his Council. An order which might have been incapable of review if based wholly on the two specific charges, assuming the Governor in Council to have been satisfied that they were proved, cannot stand if it even may have been based on a ground which is not a legitimate one on which to proceed in depriving a British subject of his freedom of action. The importance of this consideration is not diminished by the circumstance that the reports made by the Secretary for Chinese Affairs to the Colonial Secretary in accordance with form No. 3 have not been produced.

Their Lordships have arrived at the conclusion, notwithstanding the reasons to the contrary contained in the careful judgment of the learned judges in Hong Kong, that the provisions of the Ordinance do not warrant the making of an order based upon such a general charge as that under consideration. The Secretary for Chinese Affairs on

J. C.
1920
LI HONG MI
v.
ATTORNEY-
GENERAL
FOR
HONG KONG.

J. C. November 5, 1917, interviewed the appellant under s. 4,
1920 sub-s. 6, of the Ordinance and put to him questions pur-
Li Hong Mi porting to be in accordance with form No. 2 as prescribed.
v. The nature of these questions has been already stated. The
ATTORNEY- appellant objected to the proceedings, denying the truth
GENERAL of the allegations made, specifically as to those numbered 2,
FOR and distributed under sub-heads (a), (b) and (c).
HONG KONG.

Their Lordships are of opinion that it was not competent to make against the appellant, who was a British subject, or to question him in accordance with it, the merely general allegation affecting his character, that he had made a practice of champerty and the other acts of misconduct mentioned. The Ordinance prescribes by s. 4, sub-s. 14 (a), as already stated that, in the case of a British subject, its provisions are not to apply unless, in the opinion of the Governor in Council, he comes within the category of, inter alia, a person who has been guilty of: "Any criminal offence, or of any other misconduct connected with the preparation, commencement, prosecution, defence or maintenance of any legal proceedings, or the sharing in the proceeds thereof, or the settlement or compromise thereof, or the obtaining or preparation of evidence in anticipation thereof or in relation thereto."

Their Lordships are of opinion that these words describe only a person who has been guilty of a specific offence or specific misconduct on some particular occasion, and cannot be satisfied by showing that there is a person who is merely reputed, however justly, to possess the character of having made a general practice of the sort of misconduct referred to. This being so, for the reason already given, the decision come to by the Governor in Council cannot stand. For it affects the liberty of a British subject in a fashion which the Ordinance, construed strictly as it must be, does not warrant.

Their Lordships will therefore humbly advise His Majesty that the provisions of the Ordinance have not been complied with, and that the judgment of the Supreme Court of Hong Kong, dismissing the action, must be set aside and that a

declaration should be made simply that the Order of the Governor in Council of January 15, 1917, was invalid. As the contest is one between the subject and the Crown, there will be no order as to costs.

Solicitors for appellant: *Wadeson & Malleson.*

Solicitors for respondents: *Burchells.*

J. C.
1920
LI HONG MI
v.
ATTORNEY-
GENERAL
FOR
HONG KONG.

[PRIVY COUNCIL.]

TSINKI AND OTHERS APPELLANTS;
AND
KING'S ADVOCATE RESPONDENTS.

J. C. *
1920
Mar. 3.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

Cyprus—Land Tenure—Arazi Mirie—Rights of Tenants—Sinking and connecting Wells—Permission of Government.

The tenant of State lands in Cyprus known as arazi mirie has not the right, without the special permission of the Government, to sink wells or to connect a chain of wells for the purpose of supplying water to a village as distinguished from the exclusive purpose of cultivation.

Quære, whether he can do so, without permission, for the exclusive purpose of cultivation.

APPEAL from a judgment of the Supreme Court of Cyprus (February 9, 1914) reversing a judgment of the District Court of Nicosia (January 23, 1913).

The appellants, thirteen in number, brought an action in the District Court against the Government of Cyprus, sued through the King's Advocate, claiming by the indorsement of the writ a declaration that they were "entitled to sink and connect chains of wells (for the purpose of obtaining water and conducting water to their village) on arazi mirie land without having obtained the permission of the Government so to do." The only issue framed in the action

* *Present*: VISCOUNT HALDANE, LORD BUCKMASTER, and LORD ATKINSON.

J. C. 1920 was whether or not the plaintiffs had the right which they claimed.

TSINKI
v.
KING'S
ADVOCATE.

Arazi mirie is land which belongs to the Government Treasury, and which has been granted or perpetually leased to the mutessarif, with a right of user (hoquoq-tessaruf), the lordship (raqabe) remaining in the Government; a rent either in money or in produce is reserved and, in some cases a rent in advance is paid.

The appellants were inhabitants of the village of Akaki; some of them were mutessarifs, and others sub-tenants holding from mutessarifs.

No evidence was called at the hearing, the case being argued as a question of law upon the issue above mentioned.

By clause 25 of the Cyprus Courts of Justice Order, 1882, an Order in Council which dealt with the administration of justice in the island of Cyprus after its occupation by Great Britain, it was provided that "in all actions relating to immovable property the rights of the parties shall be regulated by Ottoman law as modified or altered by Cyprus Statute law." Ottoman law is embodied in the Mejelle (civil law) and the Ottoman Land Code. The Mejelle does not deal directly with arazi mirie tenure, but contains provision with regard to the hiring and letting of immovables.

The action was tried in the District Court by the President of that Court and Macrides J., the former of whom was of opinion that the plaintiffs were not entitled to the declaration which they claimed, while the latter was of opinion that they were so entitled; the action was accordingly dismissed.

Upon an appeal to the Supreme Court (Tyser C.J. and Fisher J.) the judgment was affirmed.

The learned Chief Justice, after an exhaustive consideration of the origin of arazi mirie tenure, and the history of the Ottoman law with regard to it, said that the question depended upon the true construction of the Ottoman Land Code, remembering that it was a Code giving legislative authority to a number of Imperial orders and fatwas which previously existed. The effect was that the mutessarif of arazi mirie had the right of possession and the right of taking

the fruit, except so far as he was bound to give tithes to the State, in whom remained the raqabe—namely, the land itself and the mulk interest. Neither the right of possession nor the right of user, which was rigidly set out in sections of the Code, included the right claimed. He said: “The intention of the legislator would no doubt be to create a tenure which was good in all respects by the sacred law, and for this purpose to set out clearly what use the mutessarif might make of the land. Certain uses are set out. The intention of the legislator must have been that the mutessarif is entitled to make such use of arazi mirie as is declared in the Land Code and no other. Therefore, his jus utendi does not give the mutessarif the right to dig wells, and there is no ground on which he can be granted the declaration which he claims.”

He concluded his judgment by observing as follows: “Any other interpretation might cause grievous harm to the community. In a country like Cyprus, where there is so often a dearth of water, it would be a great misfortune to the community if a few people could get control of the main source of the summer water without any obligation to supply the needs of the community or any restriction in the price they might charge, or any regulation to prevent that lamentable waste which is sometimes seen when individuals or communities have an uncontrolled right over water.”

Fisher J. concurred with the judgment of the Chief Justice which is fully reported at 10 Cyprus L. R. 54.

1920. *Maugham K.C.* and *Theodotou* for the appellants. The view taken by the Supreme Court that if the Ottoman Land Code did not expressly allow user of a certain kind it was not permissible, was wrong. Provided that a particular user is not forbidden, and does not amount to waste, it should be regarded as allowed. The declaration asked for may have been unfortunately formulated, but if the judgment stands a holder of arazi mirie is deprived of all right to sink wells, and that in many cases would render the land valueless. The land is occupied for the purpose of cultivation, and the mutessarif consequently has an unfettered right to sink

J. C.
1920
TSINKI
v.
KING'S
ADVOCATE.

J. C.
1920
TSINKI
v.
KING'S
ADVOCATE.

wells for that purpose. He can also construct wells in combination with other holders for that purpose. If so, there is nothing in the Ottoman Land Code, or in the Mejelle, which prevents the application of surface water to other purposes ; it is not material on what terms. The Wells Act (Law VI. of 1896), s. 5, prevents any damage being done by the user. The Mejelle does not apply ; the Supreme Court wrongly regarded it as having a bearing upon the construction of the Land Code. [Reference was also made to the Ottoman Land Code, arts. 9, 14 ; Fisher's Ottoman Land Laws ; Chiha's *La propriété immobilière en droit Ottoman* (Alexandria, 1906), pp. 130, 131 ; and to *Zade v. Tsinki*. (1)]

Tomlin K.C. and *Giveen* for the respondents were not called upon.

March 3. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Cyprus (Sir C. R. Tyser C.J. and Fisher J.) dismissing an appeal from the District Court of Nicosia in an action in which the appellants were plaintiffs and the respondent was defendant, and in which judgment had been entered in the Court of first instance for the defendant, in consequence of the two judges in that Court having differed. The question decided was defined in an issue settled as being, "Are the plaintiffs entitled to sink and connect chains of wells (for the purpose of obtaining water and of conducting water to their village) on *arazi mirie* without having to obtain the permission of the Government to do so ? "

The answer to this question is governed by Turkish Mohamedan law as obtaining, with such modifications as have been made in its application, to the island of Cyprus by the Ottoman land laws and by Cyprus statute law. Among other forms of landownership under these laws is "mulk" land, which comprises special kinds possessed in full ownership, and State land or *arazi mirie*, the legal ownership of which is vested in the Government, the title of the

person in possession being derived from a grant made in consideration of what is called the "tapou" fee to the State and subject to the payment of a tithe. The right of possession by the tenant is in the nature of a burden on the radical title of the State, rather than of a legal estate such as a tenant may own by English law. Although transmissible, and in this respect analogous to a leasehold, it is a usufruct granted in order that the land may be cultivated and rendered productive of tithe to the State as well as of profit to the person entitled to the possession.

Neither in the *Mejelle*, the book which contains a code of Ottoman civil law, nor in the treatise on the Ottoman land laws written by Fisher J., nor in the statute laws of Cyprus, have their Lordships found any distinct authority decisive of the points which have been raised in the course of the arguments before them. But they think that the rights of the mutessarifs, or tenants, of arazi mirie, which burden the radical title of the Government, are limited by the end for which they were created, the cultivation of the land and the rendering it productive. If this be so, these rights do not extend to the sinking and construction of wells or chains of wells, without special permission from the Government, for the purpose of conducting water to supply villages, as distinguished from the exclusive purpose of cultivation. It may be that if the latter purpose is the only one, the mutessarifs may sink the wells required in order to facilitate cultivation and irrigation without such permission. Their Lordships express no opinion on the point, inasmuch as it does not arise in the case before them, and they only refer to it in order to guard against its being supposed that in affirming the judgment of the Court below they are indorsing certain somewhat general words used by the Chief Justice, who observes in passing that "his *jus utendi* does not give to the mutessarif the right to dig wells." That point was left open in the earlier case of *Zade v. Tsinki* (1), decided in 1910, and their Lordships do not propose to express an opinion on it. The only observation they desire to make in this

J. C.
1920
TSINKI
v.
KING'S
ADVOCATE.

(1) 9 Cyprus L. R. 68.

J. C.
1920
TSINKI
v.
KING'S
ADVOCATE.

connection is that they think that art. 14 of the Ottoman Land Code does not, as was suggested in the argument for the appellants, apply to their case, or affect either this or the larger question of the right claimed in this action. That article provides that no one can arbitrarily make a water channel or a threshing floor on the land of another, nor do any other arbitrary act of possession on it without the sanction and knowledge of the possessor. Their Lordships are of opinion that the expression of this prohibition is not in itself enough to afford sanction for the claim to sink wells for purposes even of mere cultivation, apart from Government sanction. If the claim to do this can be sustained, as may be the case, it must rest, not on the words used in art. 14, but on the general law.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Busk, Mellor & Norris.*

Solicitors for respondents : *Burchells.*

J. C. *
1920
May 4.

[PRIVY COUNCIL.]

THE OSCAR II.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Negligence in effecting Capture—Loss of Goods—Action against Procurator-General—Liability—Prize Court Rules, 1914, Order II., r. 3.

The respondent's goods on board the neutral ship *O.* were lost through a collision with His Majesty's ship *P.*, while the *P.* was effecting the capture of the *O.* The collision was solely caused by the negligence of the *P.* Proceedings in prize were instituted by the Procurator-General against some of the parcels of goods laden in the *O.*, and they were condemned, but there were no proceedings against the ship nor against the respondent's goods, which it was admitted were not liable to condemnation. In an action brought by the respondent by writ in the

Present : LORD SUMNER, LORD PARMOOR, LORD WRENBURY, The LORD JUSTICE-CLERK, and SIR ARTHUR CHANNELL.

Prize Court against the Procurator-General, the President ordered the restoration of the respondent's goods and that their value be ascertained by the registrar and merchants :—

Held, that, as the effect of the Prize Court Rules, 1914, whereby the Procurator-General was substituted for the actual captors, he was liable to the respondent; and that the rules were not ultra vires so far as they imposed that liability.

Observations in *The Zamora* [1916] 2 A. C. 77 followed.

Judgment of the Prize Court affirmed.

J. C.
1920
THE
OSCAR II.

APPEAL from a judgment of the President of the Admiralty Division (in Prize). (1)

In the circumstances appearing from the judgment of their Lordships the respondent, a neutral, brought an action against "the Procurator-General or other the proper officer of the Crown" to recover damages for the loss of 250 bags of coffee laden on board the neutral ship *Oscar II*.

The President (Lord Sterndale) on April 3, 1919, ordered the restoration of the goods and that their value should be ascertained by the Registrar and merchants.

1920. March 18. *Sir Ernest Pollock S.-G.* and *Stuart Bevan K.C.* (with them *Sir Gordon Hewart A.-G.*) for the appellant, the Procurator-General. Upon the true construction of the Prize Court Rules, 1914, the Procurator-General can only be treated as substituted for the captors in cases in which he institutes proceedings. *The Zamora* (2) so far as it contains observations on this question is distinguishable, as in that case the Procurator-General had made himself a party. If the rules impose liability they are to that extent ultra vires: first, because by s. 55, sub-s. 4, of the Naval Prize Act, 1864, the prerogative of the Crown is expressly preserved, and the Crown cannot be sued in tort; secondly, because the power given by the Prize Courts Act, 1894, s. 3, under which the rules were made, is merely to make rules regulating procedure and practice. [Reference was also made to *The Mentor* (3) and *The Südmark No. 2.* (4)]

Sir Erle Richards K.C. and *Balloch* for the respondent. Under the old practice the captor would have been liable in

(1) [1919] P. 171.

(3) (1799) 1 C. Rob. 179.

(2) [1916] 2 A. C. 77.

(4) [1918] A. C. 475.

J. C. damages: *The Der Mohr* (1); and would have been so
 1920 liable in proceedings in the Prize Court: *The Corsican*
 THE *Prince*. (2) The effect of the Prize Court Rules, 1914, was to
 OSCAR II. substitute Procurator-General for the captors in all proceedings.
 Even if the Procurator-General would not have been liable if
 he had taken no proceedings, he is liable here because
 by taking proceedings against other parcels he admitted
 that the Crown was custodian of all the captured goods.
 The rules are not ultra vires so far as they result in
 the Procurator being liable. There is nothing against
 the prerogative of the Crown in putting the Crown in the
 position of captors under international law. Prerogative is
 a matter of municipal, not international, law. Moreover the
 rules were confirmed by Order in Council, and the assumed
 liability is a matter of concession to neutrals. If the rules are
 ultra vires so far as they impose liability for damages, they are
 so with regard to liability for costs. The whole question is
 concluded by the judgment in *The Zamora*. (3)

Stuart Bevan K.C. replied.

May 4. The judgment of their Lordships was delivered by
 LORD SUMNER. In this case the Procurator-General appeals
 from a decree of Lord Sterndale, sitting in prize, by which he
 ordered the restoration to the claimants, as owners, of 250 bags
 of coffee, part of the cargo of the *Oscar II.*, their value to be
 ascertained hereafter by the Registrar and merchants. It was
 admitted that the ship with her cargo was sunk on July 1, 1915,
 by reason of a collision with H.M.S. *Patuca*, in which the latter
 was alone to blame; that the *Patuca* was engaged at the
 time in capturing the *Oscar II.* in order to bring her and her
 cargo into port as prize of war for the Crown; and that in
 fact the coffee was not liable to condemnation on any ground.
 No evidence was given nor were the precise circumstances
 explained under which the collision occurred. It is, however,
 clear that the captors' obligation to be answerable for due care
 in the custody and treatment of the property seized had

(1) (1800) 3 C. Rob. 129.

(2) [1916] P. 195.

(3) [1919] 2 A. C. 77, 87, 111.

already attached, and their Lordships were informed that the *Oscar II.* had reached port before she actually foundered in consequence of the collision. There seems to have been no salvage.

J. C.
1920
THE
OSCAR II.

The owners of this coffee had a good claim against somebody. So much was not in dispute. The question was whether the Procurator-General could be made liable. Shortly after the *Oscar II.* sank, the Lords Commissioners of the Admiralty accepted liability both for ship and cargo, but as they claimed to limit the amount of the liability no action was taken against the navigating officer. Matters then remained in abeyance until the following year. In March, 1916, for reasons which must be surmised, the Procurator-General issued a writ praying condemnation as prize of part of the lost cargo of the *Oscar II.*, the 250 bags in question not being included in the claim. In July, 1918, the present claimants issued a writ to recover from the Crown and the Procurator-General damages for the loss of their cargo by reason of the collision, and the Procurator-General having entered an appearance and alleged that their action was misconceived, the question went to trial without further formal proceeding than an admission of facts. The learned President expressed a doubt whether the course taken by the claimants was correct in form but, as the question was merely one of procedure and could only affect costs, he treated the point as immaterial, and it has not been pressed on their Lordships as a ground for allowing the appeal. The true issue is the liability of the Procurator-General.

Captures at sea in time of war are made under the authority of the Crown in the exercise of its belligerent rights. In the regular course those who effect the capture must hold the Sovereign's commission, though a capture made without it may be afterwards ratified and adopted by the Crown. Subject to condemnation in prize, the capture is for the Crown's benefit, and it is by the Crown's bounty that the actual captors participate in the fruits of the prize. On the other hand, the obligation is unquestioned to bring the prize in for condemnation and, pending its delivery into the custody of a Court of Prize, to safeguard it from avoidable injury or loss. This

J. C.
1920
THE
OSCAR II.

obligation is for the benefit of the parties interested, to whom the property may be released by the Court if grounds of condemnation fail. These belligerent rights and these obligations towards neutrals are correlative and ought to correspond. They are rights and obligations of the Crown, though exercised and discharged by the proper executive officers.

The Prize Court Rules now make provision for the commencement of the proceedings for condemnation, to which according to old practice the actual captors were parties, by the issue of a writ in the name of the Crown only, by its proper officer who is the Procurator-General. As a result of this change the position of neutrals in a Court of Prize must be greatly prejudiced unless, in assuming the position of captor in the Prize Court proceedings, the Crown also assumes responsibility towards neutral claimants. This matter came before their Lordships' Board in *The Zamora* (1), and, at least as regards liability for dealings with the res during the proceedings to the prejudice of the parties ultimately successful, the question was decided. What now remains open is responsibility for damage arising from failure to take care of the res prior to the commencement of proceedings in the Prize Court. Is there any reason why a similar conclusion should not be deduced from the orders and rules in the present case? If not, can it be said that to such extent the orders and rules are ultra vires?

The general effect of that judgment, so far as relates to the present question, is summed up in the following passage:—
“In their Lordships' opinion, these rules are framed on the footing that where the Crown by its proper officer is a party to the proceedings it takes upon itself the liability as to damages and costs to which under the old procedure the actual captors were subject.” (2) This passage does not limit the liability spoken of to the consequences of dealings which take place after the issue of the writ, and it sums up the whole argument upon the construction of the orders and rules, which forms the foundation of the judgment, in a manner which does not lend itself to a restricted application.

(1) [1916] 2 A. C. 77.

(2) [1916] 2 A. C. 111.

It was contended before their Lordships that the Procurator-General takes the place of captor only for the purpose of the proceedings in the Prize Court. Hence, it was said, he cannot as captor for that purpose have any responsibility for the derelictions of duty of persons, strangers to himself and his office, which took place before the proceedings began. It was said further that the present proceedings, for the purpose of which alone he assumed the position of captor, are taken against other cargo and do not relate to the parcel of coffee in question, and that a claim cannot now be enforced against him at the instance of persons whose cargo he does not seek to have condemned.

In their Lordships' opinion the effect of the Prize Court Rules is that, after the proceedings are instituted, the Procurator-General is the captor not for particular and specified purposes, but generally, though it is true that the actual captors are referred to in some rules for specific purposes, such as joint capture and prize bounty. It is not necessary for their Lordships to decide on the present occasion whether damages could have been claimed against him, if he had commenced no proceedings in prize, though they are not to be understood as negating his liability even in such a case. They are, however, unable to find anything in the rules to limit his liability, since he has elected to begin proceedings, to such dealings with the subject-matter of the suit as took place in the course of it, and they think that, as a matter of construction, his position and liabilities cannot be so restricted.

Equally little are they able to accept the argument that his liability is only to such persons as may be interested in the actual goods whose condemnation he may have chosen to seek in such proceedings as he thinks fit to institute. The actual captors seized the whole ship and all her cargo. To bring any of it into port they had to bring in all, and they exposed all in common to the risk of such dereliction of duty as they were guilty of and were bound to deliver to the custody of the Court all that they might ultimately bring in. Upon this argument, if there had been partial damage to part of the cargo instead of total loss of all the Procurator-General might have chosen

J. C.
1920
THE
OSCAR II.

J. C.
1920
THE
OSCAR II.

the undamaged cargo as the subject of his proceedings for condemnation, and by forbearing to ask for the condemnation of such cargo as suffered injury might have escaped all liability in respect of it. Such a contention only needs to be stated to be dismissed. A Court of Prize, unless constrained by the authority of the most explicit and binding regulations, could not expose to so gross an unfairness those neutrals whose interests are committed to its protection.

It was then argued that if the rules impose on the Procurator-General so wide a liability they go beyond the function of rules of practice and procedure, transcend the statutory power given by the Act of 1894, which is a rule-making power, and trench upon the Royal prerogative, which the Naval Prize Act of 1864 expressly saves. Their Lordships think that these points are scarcely debateable since the decision in *The Zamora* (1), even though they may not have been expressly dealt with in the terms of that judgment. The argument involves no little injustice. Had the Crown been pleased to issue the proclamation, usual in former wars, granting prize to the actual captors, and had the traditional practice remained unaltered, they would have been liable in the Prize Court proceedings for neglect of due care. On the present view, by forbearing to issue such a proclamation the Crown takes to itself the fruits of the capture when harvested in the Prize Court, but leaves to the neutral only the satisfaction, often a barren one, of looking to the actual captors in other proceedings for payment of compensation if his property is damaged by neglect of the captors' duty. The argument further involves some confusion. The prerogative of the Crown is strictly not involved either in the capture or in its incidents. No question then arises between the Crown and its subjects. The belligerent right of the Crown is to seize the property of neutrals at sea in time of war under certain circumstances and on certain conditions. One such condition is that the property be brought before a Court of Prize for adjudication; another is that in the meantime a certain established [measure of care be used in dealing with the

(1) [1916] 2 A. C. 77.

property. It is not one of the belligerent rights of the Crown to damage neutral property after seizure, either by omission or commission. The obligation to bring the property before the Court for condemnation is one which may be discharged by the actual captors; or, if the Crown is minded to discharge that obligation and to institute the necessary proceedings by its proper officer, such a course may be taken either at pleasure or under a permanent regulation. If the Crown is pleased to take this course it waives the right to leave the actual captors to be the parties to act. Again to seek the exercise of one part of the jurisdiction of the Court is in itself a submission to the exercise, when justice requires it, of the correlative jurisdiction of the Court if the claim for a decree of condemnation fails. The enforcement against the party, who alone is before it as captor, of the liability for neglect of a captor's duty may indeed be regarded as being in itself a matter of practice and procedure, for it is part of the *cursus curiæ*, rules or no rules. The matter may however be put somewhat higher. If the Crown is pleased to assume a position which involves the abandonment of its right not to be made liable in damages but to leave the enforcement of such liability to be made against the parties actually in fault, such a diminution or waiver of its position is valid. Now the rules are made under the authority of an Order in Council and, as this Board pointed out in *The Zamora* (1), if by Order in Council the Crown intimates consent to being placed in a position more limited than might have been claimed for it had its full rights been insisted on, a Court of Prize is bound to give effect to such a waiver in favour of the neutral. Were it otherwise the Crown would be placed in the position of seeming to approbate the part of the rules by which it obtains as captor the advantage of a condemnation, and to reprobate that part by which it bears the captor's responsibility. Such a waiver is the effect of what is done under the Prize Court Rules, and this is why the construction of those rules was accepted in *The Zamora* (1) as being the only real question. Their Lordships think that

J. C.
1920
THE
OSCAR II.

(1) [1916] 2 A. C. 77.

J. C.
1920
THE
OSCAR II.

the construction, which in that case made the Procurator-General liable in damages and costs under the rules, is equally applicable in the present case. There is no ground for holding the rules to be ultra vires. The decision of Lord Sterndale was therefore right and ought to be affirmed. Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Solicitor for appellant : *Treasury Solicitor.*

Solicitors for respondent : *Waltons & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*

SIR W. G. ARMSTRONG, WHITWORTH }
 AND COMPANY, LIMITED } APPELLANTS;

1920
March 26.

AND

REDFORD RESPONDENT.

*Workmen's Compensation—Arising out of and in the course of Employment—
 Dinner Hour—Injury on returning to Work from provided Canteen—
 Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.*

A girl employed as a machinist left the works where she was employed, during the dinner hour, as the rules required, and went to a canteen provided by the employers for their women workers in another part of the premises. The canteen and the works were within the same curtilage, but by day the canteen could only be reached by the street. The workers were invited, but were not obliged, to use the canteen. After finishing her dinner the girl was hurrying down a flight of stone stairs leading from the canteen into the street in order to return to her work when she slipped and broke her ankle. She claimed compensation under the Workmen's Compensation Act, 1906 :—

Held (by Lord Sumner, Lord Parmoor, and Lord Wrenbury; Viscount Finlay and Lord Dunedin dissenting) that there was evidence upon which the arbitrator could find that the injury arose in the course of as well as out of the employment.

Per LORD DUNEDIN: The case is concluded against the claimant by the interpretation of the Act adopted by the House of Lords in *Davidson v. M'Robb* [1918] A. C. 304. The test of whether the injury arises in the course of the employment is not the situation or ownership of the premises, but whether resort to the premises is a part of the duty owed to the employer.

Decision of the Court of Appeal [1919] W. N. 153 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming an award of the judge of the Manchester County Court under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the judgment of Viscount Finlay :—

“The respondent is a machinist and was in the employ

* *Present*: VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

(1) [1919] W. N. 153.

H. L. (E.) of the appellants at their works in North Street, Manchester.
1920 As stated by the arbitrator in the course of his judgment :—

ARMSTRONG,
WHITWORTH
& Co.

v.
REDFORD.

“ ‘ It is a rule at the works that all employees should leave the premises at 1 P.M. for an hour. They leave by the exit from the works in North Street. The employees then are free to go where they like, either to obtain dinner or for any other purpose. They all have to return and “ clock on ” at 2 P.M., when the hooter sounds. It sounds for some few minutes, and anyone who is late loses half an hour’s pay.’ ”

“ On October 2, 1918, the respondent was at the appellants’ works in the course of her employment. At 1 P.M. she left the premises by the entrance to the works in North Street. She then walked a few yards along the pavement till she came to the outer door leading upstairs to the canteen into which she went.

“ This canteen is situate over the office of the appellants, and is provided by them for their workpeople. The building in which are the office and canteen is situate some little distance from the works, but within the same outer wall as shown in the plan. There is a doorway giving access to the passage at the foot of the canteen stairs from the other passage by which the workpeople obtain access to the street from the works and vice versa, but this door is open only at night for the use of the employees on the night shifts. The building in which is the canteen belongs to the employers and the canteen is kept up by them for the benefit of their workpeople and is under the control of the employers. The employees are entitled to use the canteen, and they may either bring their food and eat it there, or obtain food in the canteen. If there is any surplus from the takings at the canteen after paying expenses it is devoted to charitable purposes, and the employers derive no profit from it. No persons other than employees of the appellants are permitted to use the canteen.

“ The respondent, on the day of the accident, took her mid-day meal at the canteen, and when the hooter sounded for return to work at 2 P.M., in going down the stairs leading

from the canteen itself to the exit into North Street she slipped and broke her ankle." H. L. (E.)

1920

The County Court judge found that the injury arose out of and in the course of the respondent's employment and made an award in her favour. The Court of Appeal (Swinfen Eady M.R., Warrington and Duke L.J.J.) held that there was ample evidence to support the finding of the arbitrator and affirmed his award.

ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.

Feb. 23, 24. *Rigby Swift K.C.* and *Meynell* for the appellants. This accident did not arise out of or in the course of the respondent's employment because she owed no duty to her employers to go into this canteen and the canteen cannot be held to be part of the works. She might just as well have had her dinner at home and in that case clearly the employers would not have been liable. When a workman leaves the sphere of his work and the duties which he is employed to do cease, then the accident does not arise out of or in the course of the employment. There was here an interruption of the employment by the dinner hour and during that hour the respondent was not in the place where she was engaged at her work and, in fact, was not allowed to be there. It is immaterial whether the accident happens on the employer's premises or not; the test is whether it happens as the result of some duty owed to the employer. It would have made no difference to the appellants' argument if the door between the works and the canteen had been open, as it was at night. Some confusion arises from the use of the term "employer's premises." If the term is used to mean that part of the employer's holding where his workmen are employed this canteen was not part of the employer's premises; and if the County Court judge finds that this was part of the premises upon which this girl was working there is no evidence to support that conclusion. It is closed away from the works, it is approached by the street, and no work is carried on there. The fact that an employer provides accommodation for his employees to which a workman may go or not as he pleases does not make him responsible for any accident to the

H. L. (E.) workman while there. This case is governed by the principles laid down by this House in *Parker v. S.S. Black Rock* (1) 1920 and *Davidson v. M'Robb*. (2) Those cases establish the proposition that in order that liability may accrue under the Act the accident must arise while the workman is doing something, or is in some place, in furtherance of the duty which he owes to his master. In *Blovelt v. Sawyer* (3) the man was taking his meal at the works, but that case, unless distinguishable, was wrongly decided and is inconsistent with the law as stated in this House. Farwell L.J., in explaining that case in *Gilbert v. S.S. Nizam* (4), says that a man who is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment, notwithstanding that, and not because, he was eating his dinner. "The necessity for food," he says, "no more arises out of his employment than the necessity for sleep." The decision of the Court of Appeal in the present case is indistinguishable in principle from *Bell v. Armstrong* (5) and *Philbin v. Hayes* (6) —both cases of provided accommodation—in which the Court arrived at the opposite conclusion.

The following cases were also referred to: *Stewart v. Longhurst* (7); *Cross, Tetley & Co. v. Catterall* (8); *Cook v. S.S. Montreal* (9); *Thom v. Sinclair* (10); *Dennis v. White* (11); *Gane v. Norton Hill Colliery* (12); *Rowland v. Wright* (13); *Morris v. Mayor of Lambeth* (14); *Walters v. Staveley Co.* (15)

Holman Gregory K.C. (with him *Eastham*) for the respondent. Warrington L.J. correctly states the legal position in the following passage of his judgment: "The period set apart for the meal in the middle of the day does not, in the absence

(1) [1915] A. C. 725, 728.

(2) [1918] A. C. 304, 321.

(3) [1904] 1 K. B. 271.

(4) [1910] 2 K. B. 555.

(5) (1919) 12 B. W. C. C. 138.

(6) (1918) 11 B. W. C. C. 85.

(7) [1917] A. C. 249.

(8) Cited in *Sharp v. Johnson & Co.*

[1905] 2 K. B. 139, 145.

(9) (1913) 6 B. W. C. C. 220.

(10) [1917] A. C. 127.

(11) [1917] A. C. 479.

(12) [1909] 2 K. B. 539.

(13) [1909] 1 K. B. 963.

(14) (1905) 22 Times L. R. 22.

(15) (1910) 4 B. W. C. C. 89, 303.

of some other circumstance, create an interruption in the employment, and it certainly does not where the workman takes his meal, with the employer's permission, upon the premises upon which he is engaged." That was the ground of decision in *Blovelt v. Sawyer* (1) and it is correct. If a workman goes home to his meals then other circumstances arise which take the case out of the Act and he does something outside the course of his employment, but so long as he remains on the employer's premises and is only doing something which is contemplated by the contract of employment, then he is within the Act. Taking meals on the premises is a natural incident of the employment. Where the contract of employment is for the day that necessitates working for a certain number of hours, it necessitates also pausing for the purpose of taking food. It is said that the respondent was not upon the works at the time of the accident, but at the present time large works include dining rooms and canteens. It cannot be said that a modern factory includes only a workshop, and it would have made no difference in this case if the factory had been under the same roof. The contract of service with the respondent entitled her to the use of this room as part of her service. She was, therefore, in the course of her employment. The provision of a canteen for the workmen is part of the carrying on of the factory and, as the Master of the Rolls said, the respondent was entitled as a term of her employment, express or implied, to use the canteen.

H. L. (E.)
1920
ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.

Rigby Swift K.C. in reply. The Act never contemplated that compensation should be paid when an accident occurs, not when the workman is doing what he is employed to do, but when he is taking advantage of the facilities provided by the employer.

The House took time for consideration.

March 26. VISCOUNT FINLAY. My Lords, this is a claim for compensation under the Workmen's Compensation Act, 1906. It came before the judge of the County Court at Manchester. He found that the accident arose out of and in

(1) [1904] 1 K. B. 271.

H. L. (E.) the course of the employment, and his decision was affirmed
 1920 in the Court of Appeal by the late Master of the Rolls and
 ARMSTRONG, Warrington and Duke L.JJ. The employers, Armstrong,
 WHITWORTH & Co., have appealed to your Lordships' House.
 v. [His Lordship stated the facts and continued:] The question
 REDFORD. is whether the personal injury was "by accident arising out
 Viscount Finlay. of and in the course of the employment."

The meaning of these words was very fully considered by your Lordships' House in the case of *Davidson v. M'Robb*. (1) The conclusion arrived at in that case is thus stated in the headnote in the Law Reports:—

"‘In the course of the employment’ does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incident to it; and absence on leave for the workman's own purposes is an interruption of the employment."

This expresses the considered opinion of four out of the five peers present at the hearing (the Lord Chancellor, Viscount Haldane, Lord Dunedin and Lord Atkinson), and the fifth (Lord Parmoor), while confining his judgment to the question whether the accident arose out of the employment in no way dissented from the views of his colleagues as to the meaning of the words "in the course of employment." The views expressed on this point form an integral part of the reasoning on which the judgments of three of their Lordships rested. By some inadvertence the word "semble" has been prefixed to this paragraph in the headnote in the Law Reports.

It is, therefore, now settled that for the purposes of the Act the accident must be in the course of the work or what is incident to it.

Before *Davidson v. M'Robb* (1) there was an impression that the words "course of the employment" denoted merely the currency of the engagement and on this reading they added practically nothing to the requirement that the accident must arise "out of" the employment. In one case to which I shall refer later on (*Blovelt v. Sawyer* (2)) it was held

(1) [1904] 1 K. B. 271.

(2) [1918] A. C. 304; 1918 S. C. (H. L.) 66.

that the accident arose out of the employment where it was caused by the fall of a wall on the employer's premises on which the workman was permitted to remain during the dinner hour to eat his dinner. This decision was explained by Farwell L.J. (*Gilbert v. S.S. Nizam* (1)) as proceeding on the principle that the workman was permitted to be there by virtue of his contract of employment. In a sense such a case is one of accident arising out of the employment because it is as an employee that the man was allowed to remain there. It certainly is not "in the course of the employment" as all work was stopped during the dinner hour, but it would have been so if "course of the employment" meant merely the currency of the engagement as was formerly supposed.

In my view the present case is determined by the interpretation of the Act adopted in *M'Robb's Case*. (2) The accident did not take place in the course of the work or what is incident to it.

The accident happened between 1 and 2 in the afternoon. As the employees must leave the works at 1 p.m., returning at 2, this interval is for all purposes on the same footing as the interval between the cessation of work in the afternoon and the resumption of work next morning. It is shorter, but so long as it lasts the service is entirely suspended. There is no work during that hour. The claimant was bound to leave, and did leave, the work premises; she came out into the street and she ceased to be engaged on her master's business when she came into the street, just as much as she would when leaving at the end of the working day. Till 2 o'clock she was absolutely her own mistress, and there was no obligation upon her to go to the canteen for her dinner—she might have gone to any restaurant or to her own home.

The question may be illustrated by considering what would have been the result if the accident had happened in the street during her short passage from the exit to the canteen by coming into collision with a passing vehicle or by slipping on the pavement. Could she, in such a case, have claimed under the Workmen's Compensation Act? I think it is

H. L. (E.)
1920
ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.
—
Viscount Finlay.

(1) [1910] 2 K. B. 555, 558.

(2) [1918] A. C. 304.

H. L. (E.) 1920
 ARMSTRONG,
 WHITWORTH
 & Co.
 v.
 REDFORD.
 Viscount Finlay.

clear that she could not, but this would result not from the fact that the accident would have been due to dangers incident to traffic in the street, but from the fact that her work had for the time ceased when she passed out into the street from the works. If she had been still "in the course of her employment" she could have recovered under the Act in respect of a street accident. This was settled by the decision of your Lordships' House in *Dennis v. White*. (1) To say that the employer would not be liable for dangers of the street encountered by the workman if he was still in the course of his employment would be to relapse into the fallacy which influenced a series of decisions in the Court of Appeal (differing on this point from the Scottish Courts) that a workman cannot recover under the Act in respect of a danger of the street which is shared by all members of the public using the streets under the like conditions. If the workman was in the street in the course of his employment he can recover in respect of injury from such ordinary street risks. The only question is whether he was there in the course of his employment. This is well illustrated by the very recent decision of the Court of Appeal in *Bell v. Armstrong*. (2) In that case a woman munition worker upon a night shift, having been released for an hour's interval for supper at 10 P.M., was "clocked out" of the works, and while crossing a public road outside, in order to reach a canteen provided by the employers in their own premises a short distance away for the exclusive use of their staff of workers, was knocked down in the dark by a motor lorry and killed. She was under no obligation to go to the canteen, but might have stayed in the works if she had brought her own food with her and consumed it there, as many others did. It was held that as the deceased had left the works and gone into the street for her own purposes and not in pursuance of any duty which she owed to her employers, the accident did not arise out of or in the course of the employment. That case was decided on May 7, 1919, by the Master of the Rolls and Warrington and Duke L.JJ., a few days before the case now under appeal.

(1) [1917] A. C. 479.

(2) 12 B. W. C. C. 138, 146.

The distance in that case between the works and the canteen was 120 yards. The Master of the Rolls rested his decision entirely on the ground that the employee was not in the street on her master's business, and said :—

“ If, on the other hand, the servant is in the street either for his own pleasure or for some necessary purpose of his own, some purpose of business, even the purpose of obtaining food, then the servant is there on his own business, and is not there in respect of any duty which he owes to the master.”

The Master of the Rolls went on to quote the decision of the House of Lords in *Parker v. S.S. Black Rock*. (1) The other members of the Court concurred, and a passage from Lord Atkinson's judgment in *Davidson v. M'Robb* (2) was quoted as an accurate statement of the law :—

“ The words ‘ in the course of the employment ’ mean, I think, while the workman is doing something which he is employed to do.”

Everything that was said in the Court of Appeal in *Bell v. Armstrong* (3) would be directly applicable to the present case if the accident had happened in the street between the exit from the works and the entrance to the canteen. There, as here, the canteen was the property of the employer, and was kept up for the benefit of the workmen. The fact that the distance was, there, 120 yards from the works, while here it was three yards or so, cannot make any difference in the legal principle applicable.

The course of employment had ceased when the claimant got into the street. Did it begin again when she entered the canteen ? Such a conclusion seems to me impossible if cases under the Workmen's Compensation Act are to be governed by any legal principle. It was not in pursuance of any duty to her employers that the claimant went into the canteen and the accident did not result from any obligation which had to be satisfied in order to perform the duties of her employment.

H. L. (E.)
1920
ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.
Viscount Finlay.

(1) [1915] A. C. 725.

(2) [1918] A. C. 327.

(3) 12 B. W. C. C. 138.

H. L. (E.) It is necessary to consider carefully the precise grounds
 1920 on which the Court of Appeal held that this accident happened
 ARMSTRONG, in the course of the employment and distinguished the present
 WHITWORTH case from *Bell's Case* (1) in which the same judges had decided
 & Co. that the accident did not happen in the course of the
 v. employment.
 REDFORD.
 Viscount Finlay.

The Master of the Rolls said (appendix, p. 18) that the employees of the class of the applicant were entitled as a term of their employment, either expressed or implied, to use the canteen. He went on to point out that this is a case in which the accident happened upon the employer's premises and upon the part of the premises which was set apart for the use of the employees during their meals, a part of the premises, therefore, upon which the employees were entitled to be at the time when the accident happened. He distinguishes *Bell's Case* (1) by saying:—

“ In my judgment this case is wholly different from that case. In *Bell's Case* (1) the accident occurred in the public street. It was an ordinary street accident. This was an accident that occurred within the employers' works, within the employers' premises, though not upon the part of the premises where the machinery shop in which the applicant was usually engaged was situate, but still upon a part of the premises and works where the employee was entitled to be as a term of the contract with her employer. Now, in the ordinary way, for a street accident the employer is not liable unless it can be shown that the employee was in the street on the business of, or as a duty that she owed to, the employer. The present case is one of a different character. It is where the accident happened whilst the workman is actually on the employers' premises and during the course of the employment because the course of the employment is not interrupted by the workman's having to take adequate food.”

The decision of the County Court judge, which was affirmed in the Court of Appeal, proceeded mainly on the ground that the works and canteen were part of

the premises of the appellants, but he added another H. L. (E.) ground :—

“ I am also of opinion that in hurrying down the stairs in order to get into the works while the hooter was sounding the applicant was doing something equally for her own benefit and for that of the employers. It was for her own interest to ‘ clock on ’ while the hooter was still sounding, and it was in the interest of the employers that their work-people should be punctual. Even if there had been a break in the employment, the employment had restarted as she was in the act of ‘ clocking on.’ ”

1920
ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.
— —
Viscount Finlay.

I shall say nothing about this second ground except that, if it were valid, it would apply just as much to the case of an accident to the employee while hurrying down the steps of her own house on her way to work in the morning.

The decision of the Court of Appeal rests entirely on the fact that the accident took place upon the employers’ premises. This is quite true, but it was not on any part of the premises on which work was carried on, and the claimant was not in the canteen in pursuance of any duty to her employer. On what legal principle can it be held that the fact that the canteen is within the same outer wall as the workshop shows that the claimant was there in the course of her employment ?

The counsel for the respondent did not rest his argument upon the fact that the canteen was within the enclosure in which the works were. He contended that the same result would have followed if the canteen provided by the employers had been at some distance from the works. In my opinion it is indeed impossible to distinguish between the two cases, and if the respondent is in the right here it would follow that the employer, by providing a canteen where his employees may have their meals comfortably, extends the operation of the Workmen’s Compensation Act to any premises on which the employer has made provision for the comfort of his employees at any distance from the works.

Such a principle could not be confined to the case of a canteen. It would be just as applicable to any provision made by the employer for the recreation of his workpeople.

H. L. (E.) It would apply to a bathing place in the river, to a football
 1920 or cricket field, and to a library. It is very common, I believe,
 ARMSTRONG, in large towns to have bedroom accommodation over the
 WHITWORTH shops and other business premises for the use of the employees.
 & Co.
 v.
 REDFORD. Would the employer be liable for an accident which occurred
 Viscount Finlay. to an employee by a fall whilst going upstairs or in his bedroom ?
 Surely not. Such an accident would not be in the course of
 the employment and does not arise out of it. It arises out
 of the provisions made for the welfare of the servant when off
 duty, which had nothing to do with the service itself.

The question may be illustrated by reference to *Parker v. S.S. Black Rock*. (1) A fireman had contracted by articles which provided that the crew were to find their own provisions. He went ashore with leave to buy provisions, and when returning, fell from the pier and was drowned. The House of Lords held that, as the deceased was on shore for his own purposes and not in fulfilment of any obligation imposed on him by the contract of service, the accident did not arise out of his employment. Lord Parker of Waddington said (at p. 729) that the struggle had been to show that the absence from the ship was in pursuance of a duty owed to the employer, but that this contention failed. So here, it was not in pursuance of any duty to the employer that the respondent went to the canteen. We are always driven back to the point upon which the Court of Appeal's judgment rested, that the accident happened in the course of the employment because the canteen was on the employers' premises. What bearing can this have on the "course of the employment," particularly when the canteen was in a building separate from that in which the work was carried on, and specially appropriated to the taking of meals? If there is anything in the contention it must equally apply, as indeed was argued by the respondent's counsel, to canteens provided by the employer for his work-people at a distance from the works and, if so, it would seem to follow that the workman would be in the course of the employment while going to this canteen through the streets and that the employer would be liable for any street

(1) [1915] A. C. 725.

accident that befell him during the transit to or from the H. L. (E.) canteen.

Philbin v. Hayes (1) brings out very clearly the irrelevancy for this purpose of the employer's ownership of the premises where the accident happened. In that case huts were erected by a contractor on the premises and the workmen were allowed to live in these huts at a small charge. An accident happened to a workman by the fall of the roof while he was sleeping in one of the huts on the premises. It was held by the Court of Appeal that the employer was not liable. The huts there were used for residence and repose; the canteen here is used for taking meals. It appears to me that no distinction can be drawn between *Philbin v. Hayes* (1) and the present case. "The necessity for food," as was said by Farwell L.J., "no more arises out of his employment than the necessity for sleep": *Gilbert v. S.S. Nizam*. (2)

Anything which is incident to the work is covered by the course of employment, but to say that taking meals or taking sleep is incident to the work is surely a most unjustifiable extension of the scope of "incident." In the case of a night watchman who has to be on the premises all night, both meals and sleep are in the course of his employment. He is discharging his duty by being on the premises and guarding them, and while doing this he is entitled to take some repose and some refreshment. The same thing applies to domestic servants. But a job of that sort differs for the present purpose absolutely from the case of a workman who takes his food and sleep when off work. The night watchman is at work while he is taking his food or sleeping; the workman who takes his food during the dinner hour is off work. The two decisions of the Court of Appeal in the present case and in *Philbin v. Hayes* (1) cannot stand together. They are mutually destructive unless all attempt to decide cases of this kind on principle is to be abandoned as hopeless. In my opinion *Philbin v. Hayes* (1) was rightly decided and the decision in the present case was wrong.

(1) 11 B. W. C. C. 85; 119 L. T. 133.

(2) [1910] 2 K. B. 558.

1920

ARMSTRONG,
WHITWORTH
& Co.

v.
REDFORD.

Viscount Finlay.

H. L. (E:) Some other cases have been referred to. In *Rowland v. Wright* (1) a teamster was in the stable in the course of his duty with his horses. While there he ate his dinner, and was bitten by the stable cat. It was naturally held that eating his dinner did not put an end to the course of his employment. In such a case the workman recovers compensation not because he is eating his dinner but because he was on the spot in the course of his employment.

1920
ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.
—
Viscount Finlay.

In *Blovelt v. Sawyer* (2), to which I have already referred, the accident to the workman was during the dinner hour while he was eating his dinner on the premises. There was no rule as to the workman going or staying during the dinner hour and he was at liberty to do either. While he was eating a wall fell upon him. It was held that during the dinner hour there had been no break in the employment of the workman and that he was entitled to compensation under the Act. With reference to this case Farwell L.J. said in *Gilbert v. S.S. Nizam* (3):—

“The workman has to prove that the accident arose out of as well as in the course of his employment. The necessity for food no more arises out of his employment than the necessity for sleep. The man who is crushed by a falling wall of his employer’s premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment (as I have explained in *Gane v. Norton Hill Colliery Co.* (4)), notwithstanding that, and not because, he was eating his dinner; but it is no part of his contract of employment that he should go home or eat or drink or sleep at home or anywhere else.”

In *Blovelt’s Case* (2) the workman was upon the working premises, while in the present case the respondent was in the canteen which was devoted to the taking of meals. But I cannot think that *Blovelt’s Case* (2) would have been so decided if it had been subsequent to *M’Robb’s Case* (5) in this House.

(1) [1909] 1 K. B. 963.

(2) [1904] 1 K. B. 271.

(3) [1910] 2 K. B. 558.

(4) [1909] 2 K. B. 539, 545.

(5) [1918] A. C. 304.

If a workman, when eating his dinner, is not doing anything for his master how can it be that the mere permission to remain on the premises while he takes his meals renders the master liable? The permission to be there during an hour when work is entirely suspended does not constitute a continuance of the course of employment. It would be another case if there were no dinner hour with its suspension of all work, and the workman merely snatched a hasty meal at the place of his work. There might be said in such a case to be an uninterrupted continuance of the employment. There is a short suspension of actual work during a short absence for any necessary purpose, going to a lavatory for instance, but there is no suspension of the course of employment. But as soon as you have an hour during which work necessarily ceases, the workman, whether he is permitted to remain on the premises or not, cannot by remaining there be said to be continuing the course of his employment. The test is not whether the workman was on the employer's premises by his permission, but whether he was there on his employer's business. If he is there merely because the employer permits him to remain there, whether such permission is an implied term of the employment or not, he is not during the dinner hour engaged on his master's business any more than if he went out for his dinner.

Farwell L.J. was right in saying that the taking of meals is rather against its being in the course of employment, but I think he was not right in saying that the right to be at the place decides that it is. The question must remain whether what he was doing can be considered as part of the service. In the present case the taking of the meal was not part of the service, as Farwell L.J. pointed out in emphatic terms in the passage which I have just quoted.

It is not necessary in this case to consider what the result would have been if it had been a term of the engagement that the workman should take his meals at the canteen. It might be made a term of the employment that the workman should join the cadet corps of the factory and should attend the drills. The employer might build a chapel on his

H. L. (E.)

1920

ARMSTRONG,
WHITWORTH
& Co.v.
REDFORD.

Viscount Finlay.

H. L. (E.) premises and make it a term of engaging a workman that he should attend the services there. It might be a term of the employment that the workman should sleep in the building. Some such case may come before your Lordships on some other occasion. Much might depend on the question whether such a term were in its nature purely collateral or might be considered as relating to the "employment" itself.

1920
ARMSTRONG,
WHITWORTH
& CO.
v.
REDFORD.
Viscount Finlay.

In my opinion the decision in this case was erroneous and should be reversed with costs here and below.

LORD DUNEDIN. My Lords, if the respondent here was in the course of her employment then I do not think it could be said that there was no evidence on which the County Court judge as arbitrator could find that the accident arose out of her employment. The slippery steps were a danger of the employment. The more difficult question is, was she in the course of her employment? My Lords, I said what I had to say in that matter in the recent case of *Davidson v. M'Robb* (1), and I do not propose to repeat myself. But I will venture to quote one sentence: "The words 'course of employment' connote the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work—e.g., in the workman's case the taking of meals during the hours of labour." Had the girl been allowed an interval for her meals in the works, then, although the accident happened during her meal time, according to what I said there she would have been in the course of her employment: for she might be held to be taking her meal during her hours of labour. The judgment in this case proceeds on the view that that was the case here. I cannot reconcile that with the distinct finding on the part of the arbitrator as to what happened at 1 o'clock. He says: "It is a rule at the works that all employees should leave the premises at 1 P.M. for an hour. They leave by the exit from the works in North Street. The employees then are free to go where

(1) [1918] A. C. 304, 321.

they like, either to obtain dinner or for any other purpose. They have all to return and 'clock on' at 2 P.M., when the hooter sounds." That finding seems to me to make it impossible to say that she was in the works during that hour, or occupied at a meal during her hours of labour. Why "clock on" if labour was not interrupted? The mere fact that the canteen is on the same plot of ground as the works does not, so far as I can see, alter the position. The ownership of premises, as I said in *Stewart's Case* (1), per se settles nothing. The canteen here might just as well have been in another place altogether, separate from the plot on which the works stood. If so it would have been, I think, quite impossible to say that a girl going there instead of going to her own home was doing something so connected with her employer's work as to be in the course of her employment. The test seems to me to be, not the situation of the premises, but whether resort to the premises is a part of the duty owed to the employer.

The finding I have quoted seems to me to negative that. Nor can I myself take the view of the situation which is taken by others, that the canteen is practically in the position of an access to the works and that an accident there is really an accident within the works happening to a workman hurrying to his work. I am therefore of opinion that the appeal should be allowed.

LORD SUMNER. My Lords, the controversy in this case turns on the words "in the course of." As the respondent was hurt by slipping on her employers' slippery stairs, the accident arose "out of" her employment, if she was then "in the course of" it at all.

These words have been discussed in many cases. In *M'Robb* (2) a decision was given upon them which is, I hope, final, and it only remains to apply it. There is some difference in the exact language used by the different noble Lords who took part in that case in paraphrasing or explaining the words of the statute, but for present purposes it is not necessary

H. L. (E.)
1920
ARMSTRONG,
WHITWORTH
& Co.,
v.
REDFORD.
Lord Dunedin.

(1) [1917] A. C. 249.

(2) [1918] A. C. 304.

H. L. (E.) to inquire what difference in meaning, if any, there may be
1920 between these varying expressions.

ARMSTRONG, It is clear now that the question is not merely one of the
WHITWORTH determination or discontinuity of the relation of employer
& Co. and employee. The currency of the engagement is not the
v. test. There cannot be employment where one party no longer
REDFORD. employs and the other is no longer employed, but there may
Lord Sumner. be a break in "the course of the employment" in the sense
of the statute, though the currency of the contract is unbroken
and the legal nexus is subsisting. At the appellants' works
the respondent's contract of employment seems to have
been by the week. It did not break off at 1 o'clock and
begin again at 2, but, apart from the fact that the respon-
dent had to come back to her work, she had nothing to do
for her employer that she was employed to do after she reached
the canteen.

This case is one of the very large class in which the "dinner
hour" is emphatically the employee's own time. It is not
one where the employee is bound to stand by during meal
times, being liable to be called on and to have the continuity
of his meal broken by the intervention of some immediate
summons or duty. Here the works stopped and were cleared
for an hour. This, however, is not conclusive.

My Lords, I cannot accept the argument that a workman
gets his dinner "in the course of" his employment merely
because he must get his dinner some time or other, because
we must all eat to live. Dining is "ancillary" and
"incidental" to his continued utility no doubt, but that in
itself does not make him dine in the course of his service,
nor is dining for that reason part of his service.

This however is not all, nor is it conclusive to say that all
work was suspended for an hour. The "dinner hour" is
not a mere question of sixty minutes by the clock, nor does
a cessation of work at the machine from 1 o'clock to 2
preclude the possibility that, during those sixty minutes and
while doing something else than work at the machine, the
respondent was "in the course of" her employment for
the purposes of the Act. The pinch of this case arises from

the fact that she had finished her dinner and had left the canteen and was coming down the stairs, which were the provided means of access from part of her employer's premises to the particular part where the machines were, when she slipped and fell. I think there was evidence on which the arbitrator might find, as he did, that the stairs were part of the premises where the respondent was employed.

Accordingly this case need not be decided, one way or the other, on the ground that the canteen was part of a "welfare" undertaking, to which, under the terms of their employment, the workpeople had a right but no duty to resort, or on the ground that the canteen, though premises of the appellants', was not part of the premises where the workpeople were employed on the machinery. I by no means wish to decide that when the respondent availed herself of the option of using the canteen, which her contract of employment gave her, it might not be said of her, to quote *M'Robb's Case* (1), that "a workman who by the terms of his employment takes his meals on his employer's premises is in the course of his service in being there at meal times." Be that as it may, I do not see how the case can be any worse for the respondent, because, in the exercise of a contractual right, she resorted to the canteen instead of availing herself of the cessation of regular work to go somewhere else. Equally in either case she has to come back and, in the dinner hour, just as at the beginning and end of the day, the course of the employment may extend to traversing the means of egress or regress provided by the employer for that purpose. Had the accident happened in the street the case might well have been different.

The respondent was returning from the place where she had dined, down the stairs provided for her return, the use of which exposed her to a risk to which members of the public were not exposed just because they had no right to be there, not being the appellants' employees, for the purpose of regaining the place where she worked via the place where she "clocked on." It is a question of fact for the arbitrator to determine where the area begins over which it is an

(1) [1918] A. C. 314.

H. L. (E.)
1920
ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.
—
Lord Sumner.

H. L. (E.) incident of her employment to go, an "incident naturally connected with the class of work she had to do," and which, in fact, she was just going to do. This was said to be so with regard to the dock in *M'Robb's Case*. (1) It is no less so in the present. The steps were close to the place for "clocking on" and were part of the same structure, nor were they separated from the workshop, so far as appears, except by an inconsiderable intervening space. As a question of fact the arbitrator decided this in the respondent's favour, finding that the canteen and the rest of the works formed one entire premises and there was evidence on which he could do so. That it is a question of law seems to me to be suggested only on the ground that the stairs were not part of the works but of the canteen. They were, in fact, the means of communication between the two. While an internal door at the bottom of the stairs was kept locked, as it was, a few steps down the street from one door to the next had to be interposed, but I do not see that this constitutes a legal chasm or insulation between one part of the same building and another. At night the internal door is open and access to the works from the canteen via the stairs is all within the curtilage of the appellants' establishment. Surely we cannot hold as a matter of law that returning to work by the stairs is in the course of the employment by night but not by day. I cannot agree with the proposition that "she came out into the street and she ceased to be engaged on her master's business when she came into the street," if this is a proposition of law.

If it is one partly of law and partly of fact I think that, unless based on a finding by the arbitrator, it is inapplicable where the street is the passage between door and door close together. There is no such magic about a highway in such a connection. Again, in a sense the employers carried on two businesses: one of catering and the other of manufacturing, but the whole object of the first was the welfare of those employed in the second, and no principle of law is involved in the distinction. After all, welfare work in a mill is, let us

(1) [1918] A. C. 309, 322.

1920
ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.
Lord Sumner.

hope, for the benefit of all parties in the long run and, if an employer does extend the area of his liability under the Act by providing for the comfort of his workpeople, that cannot affect the construction of the section. If the canteen had been at a distance, or if it had been carried on for profit, the case might be different, but no opinion need be expressed about it now.

H. L. (E.)

1920

ARMSTRONG,
WHITWORTH
& Co.v.
REDFORD.

Lord Sumner.

It seems to me that the arbitrator was entitled to put to himself the question whether the respondent might not be regarded as "in the course of" her employment, while passing down the stairs to the spot where her actual work lay, and whether such passage was not "within the contemplation of both parties to the contract as necessarily incidental to it," whenever she availed herself of the canteen as she was invited and entitled to do. If he did so, there was evidence on which he could find in her favour.

The arbitrator did not actually put this question to himself nor are his findings of fact, in terms, an answer to it. I think they are such in substance, but I have been obliged to consider carefully whether he ever directed his mind as it was his duty to do. He begins his judgment by remarking that :—

"it must be remembered that this Act was passed for the purpose of enabling injured workpeople to obtain compensation and not for the benefit of insurance companies and I do not think that it is any part of the duty of County Court judges at any rate to exercise their brains in trying to draw fine distinctions to prevent the attainment of that object."

I refrain from saying all that might justly be said of this regrettable and unfounded observation. It reduces the value of any conclusions arrived at in accordance with it almost to a negligible quantity. Still we have the evidence, and in any case the respondent at least ought not to be deprived of the benefit of the findings, so far as they rest on the evidence and not merely on the arbitrator's own conclusions.

I think that on the evidence she proved such a case of an accident arising "in the course of" her employment as

H. L. (E.) cannot now be disturbed on grounds of law, and that the appeal fails.

1920

ARMSTRONG,
WHITWORTH
& Co.
v.
REDFORD.

LORD PARMOOR. My Lords, in my opinion this appeal should be dismissed. It is not clear on what exact terms the respondent was employed, but it is clear that the employment did not terminate at the dinner hour to start afresh in the afternoon.

The meaning of the words "in the course of employment" has been determined in this House in the case of *Davidson v. M'Robb*. (1) "'In the course of employment' does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incident to it." I think that a mid-day meal may be incidental to an employment such as that of the respondent, which commenced at six in the morning, and that the taking of such a meal did not as a matter of law in itself, and apart from special circumstances, create an interruption in the course of her employment. There are no special circumstances in the present case such as for instance arise when an employee is away from his work not in the course of employment, but for his own pleasure or business.

In the case of *Davidson v. M'Robb* (2) Lord Dunedin said, referring to course of employment: "It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work, e.g., in the workman's case the taking of meals during the hours of labour."

This passage supports the view that it cannot be said, as a matter of law, that the taking of meals within the dinner hour cannot come within the course of employment of a workman. The respondent took her mid-day meal in a room provided by the employers, to which she only had the right of access as an employee under the contract of employment.

(1) [1918] A. C. 304.

(2) *Ibid.* 321.

It was further established, in my opinion, that the room was within the curtilage of and formed part of the premises on which the respondent was employed. These facts are in no sense conclusive in favour of the respondent, but they tend to show that the accident did arise in the course of the employment. They are directly relevant to the consideration whether there was any evidence on which the County Court judge could come to the conclusion which he formed. That the respondent, when the accident occurred, was using the stairs, as she was entitled to use them, for the purpose of returning to her work is a factor which the County Court judge was bound to consider in coming to his decision. This case, in my opinion, comes within the category of cases which determine that if a workman during the hours of labour, while engaged on a matter ancillary and incidental to the work on which he is employed, meets with an accident in a place provided by his employer, and where he has no right to be except by virtue of his employment, such accident, in the absence of special circumstances, may be incurred in the course of his employment.

It is in this connection that the dock cases and street accident cases are of importance. In the dock cases the general test is whether in going from or returning to his ship the claimant was using an access provided for his use by the employer. In the present case the respondent, in returning to her work, was using an access provided for her use by the appellants. In the street accident cases it has been held that a street accident of an ordinary character, such as all persons using the street might be liable to, does not arise out of employment, or, in other words, that there is no causal relationship between the accident and the employment, which would support a claim for compensation. If, however, as in the bicycle case, the workman is engaged at the time of the accident in the actual work for which he is employed, it will not defeat his claim that the accident was in its character an ordinary street accident. In the present case there is a causal relationship between the employment and the accident and the claim is not defeated because any person using the stairs in the

H. L. (E.)

1920

ARMSTRONG,
WHITWORTH
& Co.

v.

REDFORD.

Lord Parmoor.

H. L. (E.) ordinary way might have slipped with the same consequential injury.

1920
ARMSTRONG,
WHITWORTH
& Co.

v.
REDFORD.

Lord Parmoor.

The County Court judge has found in the present case that the respondent has discharged the burden of proof which rests upon her. I think that there was evidence before him on which such a conclusion could within reason be found and that he has not, in so finding, made any error in law.

The appeal should be dismissed with costs.

LORD WRENBURY. My Lords, the language of the Act of Parliament and the decisions upon it are such as that I have long since abandoned the hope of deciding any case upon the words "out of and in the course of" upon grounds satisfactory to myself or convincing to others. In the present case I say no more than that I think that the girl was in the course of her employment when, in hurrying down the stairs to achieve punctuality in "clocking on," she was endeavouring to comply with the duty of punctuality which she owed to the employer, and that the stairs being "very slippery," she was exposed to the danger which resulted in the accident by the fact that it was incidental to her employment that she was allowed to be and was in that place.

On these grounds I think that the appeal should be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 26, 1920.

Solicitors for the appellants: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for R. Sheriton Holmes, Newcastle-upon-Tyne.*

Solicitor for the respondent: *A. E. Pratt, for Brooks, Marshall & Moon, Manchester.*

[HOUSE OF LORDS.]

H. L. (Ir.)

MANTON (PAUPER) APPELLANT ;

1920

April 19.

AND

CANTWELL RESPONDENT.

Workmen's Compensation—"Workman"—Casual Labourer—Repairing a Farmhouse—Employment for Purposes of Employer's Trade or Business—*Workmen's Compensation Act, 1906* (6 *Edw. 7, c. 58*), s. 13.

The question whether a casual labourer is employed "for the purposes of the employer's trade or business" so as to bring himself within the definition of "workman" in s. 13 of the *Workmen's Compensation Act, 1906*, depends upon the facts of each particular case, and does not turn on the question whether the premises in respect of which the work is done are used solely for business purposes or are used for domestic purposes also.

Dictum of Lord Cozens-Hardy M.R. in *Alderman v. Warren* (1916), 9 B. W. C. C. 507, 510 approved.

A farmer, who lived in a small farmhouse on the farm, employed a casual labourer to thatch the roof of the farmhouse. The man fell off the roof and sustained injuries which caused his death. It was a common practice for farmers in the district to do their own thatching. Upon a claim for compensation by the dependants:

Held, that there was evidence upon which the County Court judge could find that the deceased man was employed for the purposes of the farmer's trade or business.

Decision of the Court of Appeal in Ireland [1918] 2 I. R. 563 reversed.

APPEAL from an order of the Court of Appeal in Ireland (1) reversing an award of the County Court judge of Tipperary under the *Workmen's Compensation Act, 1906*.

The appellant, the widow of John Manton, claimed compensation from the respondent for the death of her husband.

Manton worked for farmers as a labourer, mainly during sowing and harvest operations, and also at thatching and cutting turf. The respondent was a farmer living in a farmhouse on a small farm in Tipperary.

* *Present*: LORD BIRKENHEAD L.C., VISCOUNT FINLAY, VISCOUNT CAVE, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

(1) [1918] 2 I. R. 563.

H. L. (IR.) On May 24, 1917, the respondent employed Manton to
1920 thatch the front of the roof of his farmhouse, and on the
MANTON following day Manton while so employed fell off the roof
v. and sustained concussion of the brain. Manton applied for
CANTWELL. arbitration, but eventually, on October 9, 1917, the parties
entered into an agreement, duly recorded, whereby the liability
of the respondent to pay compensation was admitted, and
15s. per week was to be paid to Manton during incapacity.
Shortly afterwards Manton died as the result of his injuries.
The appellant then applied for arbitration to settle the amount
of compensation payable by the respondent to her and her
children as dependants of Manton. The respondent contended
that Manton was not a "workman" within the definition
in the Workmen's Compensation Act, as the employment
was of a casual nature and otherwise than for the purposes
of the employer's trade or business.

The County Court judge found that it was a common practice
amongst farmers in the neighbourhood to do their own
thatching, but that some employed thatchers, and on the facts
above stated he held that Manton, having been at the time
of the accident engaged on repairs to the farmhouse where
the respondent lived and carried on business, was employed
for the purpose of the respondent's trade or business. He
also held that the respondent was not estopped from denying
liability by the agreement of October 9, 1917, as the appellant
was not a party to the agreement and did not claim under it.
Upon the whole case he held that the appellant was entitled
to compensation, and made an award in her favour.

The Court of Appeal (O'Connor M.R., Ronan and
Molony L.JJ.) discharged the award on the ground that
there was no evidence to support the conclusion that Manton
was employed for the purposes of his employer's trade or
business.

Murnaghan (of the Irish Bar) and *C. T. Williams* for the
appellant.

The thatching of the farmhouse is part of the ordinary
business of a farmer, and there was here sufficient evidence

to support the finding of the arbitrator. *Johnston v. Monasterevan &c. Co.* (1) is an authority in the appellant's favour, assuming that a farmhouse can be regarded as business premises, and as a matter of common experience a farmhouse is essential to the carrying on of a farm. That case was followed in *Cotter v. Johnson*. (2) Those cases have been criticized in *Alderman v. Warren* (3) so far as they purported to lay down any general principle, but the English decision is clearly distinguishable in its facts and the criticism does not hurt the appellant. The true ratio decidendi of *Cotter v. Johnson* (2) was that the work was executed to serve the farm. *Alderman v. Warren* (3) was distinguished in *Boothby v. Patrick* (4), but it is no part of the appellant's case to challenge either of these cases. Further, the agreement of October 9, 1917, even assuming, as was held by the Courts below, that it did not raise an estoppel against the respondent, was at least a cogent piece of evidence to be taken into account by the County Court judge in considering the question of the respondent's liability in the present proceedings. It is an admission as to an issue which is the same both in the case of the workman and in the case of his dependants, namely, as to the status of the employee; it is an admission that the deceased man was a workman to which the Act applied. [They also referred to *Williams v. Vauxhall Colliery Co.* (5) and *Cleverley v. Gas Light and Coke Co.* (6)]

Scanlan for the respondent.

The deceased was not a workman within s. 13 of the Act, as the work was not done for the purpose of the employer's trade or business. The Act clearly distinguishes between trade purposes and residential purposes. Unless there is evidence to show that this house was used for some purpose other than that of a residence this appeal fails, and there is no suggestion of any such evidence. This was work of a

H. L. (IR.)
1920
MANTON
v.
CANTWELL.

(1) (1908) 42 Ir. L. T. 268;
2 B. W. C. C. 183.

(2) (1911) 45 Ir. L. T. 259;
5 B. W. C. C. 568.

(3) 9 B. W. C. C. 507, 510.

(4) (1918) 11 B. W. C. C. 201, 205.

(5) [1907] 2 K. B. 433.

(6) (1907) 1 B. W. C. C. 82.

H. L. (Ir.) domestic nature, and the fact that it is often done by the farmer himself does not show that it is part of a farmer's business. If the work had been done upon a byre or outhouse the case might have been different. It is not essential to a farmer's business that his residence should be on the farm, and there is no evidence indicating that any business was carried on at this farmhouse. The case cannot turn upon the distinction between a house which is thatched and a house which is slated by reason of the fact that the material for the thatch is or may be grown upon the farm. Thatching is not farming. The trade or occupation of a farmer is capable of more or less exact definition, and while it includes looking after cattle and crops it does not necessarily include repairing the farmhouse. In this matter of thatching the farmhouse no higher liability arises from the fact that the employer is a farmer living in a dwelling-house on his farm. The arbitrator was not entitled to infer exclusively from his own local knowledge that the respondent carried on the business of a farmer in his house, and there is consequently no evidence to support that finding.

[He referred to *Hill v. Begg* (1); *Rennie v. Reid* (2); *Spiers v. Elderslie S.S. Co.* (3); *M'Alinden v. Nimmo* (4); *Smith v. Anderson*. (5)]

LORD BIRKENHEAD L.C. My Lords, this is an appeal from an order of the Court of Appeal (Ireland) made on June 27, 1918, allowing an appeal by the respondent against an award of the County Court judge of Tipperary given on April 2, 1918, in an arbitration under the Workmen's Compensation Act, 1906. The present appellant was applicant and the respondent was respondent in that arbitration.

John Manton, the husband of the appellant, was employed by the respondent at the period with which we are concerned to thatch the roof of the respondent's farmhouse in which the latter resided. Manton was

(1) [1908] 2 K. B. 802.

(3) 1909 S. C. 1259; 2 B. W. C. C.

(2) 1908 S. C. 1051; 1 B. W. C. C. 205.

324.

(4) 1918 S. C. 329, 333.

(5) (1880) 15 Ch. D. 247.

a farm labourer and was employed by the farmers in the district in which he lived in various capacities. On May 25, 1917, he was employed in the work to which I have referred; he fell off the roof, sustained serious injury involving concussion of the brain and spinal cord, and at a later stage of the case producing paralysis. On August 2, 1917, he requested an arbitration under the provisions of the Workmen's Compensation Act, 1906. After various interlocutory steps had been taken an agreement was reached on October 9, 1917, with respect to the personal injury referred to, between the deceased and the respondent's solicitor, in which it was agreed, to summarize the provisions: "(1.) The liability of the said Patrick Cantwell to the said John Manton to pay compensation under the Workmen's Compensation Act of 1906 be and the same is hereby admitted"; and "(2.) That the said Patrick Cantwell shall pay to the said John Manton the weekly sum of fifteen shillings as from the 25th day of May 1917 during his total incapacity or until the said sum be varied by Order of the Court." On October 25, 1917, John Manton died as a result of the injuries sustained by him on May 25, and letters of administration of his personal estate were granted to the present appellant, his widow, on November 27, 1917. On November 29 the appellant requested the arbitration under the provisions of the Workmen's Compensation Act, 1906, with which we are concerned to-day. The arbitration was heard on April 2, 1918, before the County Court judge of Tipperary. The points which were argued before the learned County Court judge were twofold. It was contended on behalf of the respondent that the case of the deceased man was covered adversely to his contention by the language of s. 13 of the Workmen's Compensation Act, 1906. The material passage is as follows: "'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business."

H. L. (IR.)

1920

MANTON

v.

CANTWELL.

Lord

Birkenhead L.C.

H. L. (IR.)
1920
MANTON
v.
CANTWELL.
—
Lord
Birkenhead L.C.
—

My Lords, the language of the passage I have just read is perhaps somewhat open to criticism on the question of draftsmanship, but the effect of it is nevertheless plain. The meaning of the second limb of the sentence is that if a man be employed for the purposes of the trade or business the employer is liable to him even though the employment be of a casual nature. The question, and the only question, therefore, which required determination on this branch of the case was whether or not Manton was employed for the purposes of his employer's trade or business. The learned County Court judge reached the conclusion on a question of fact, and having before him evidence entitling him so to find, that he was so employed and made an order accordingly. It was further argued before the learned County Court judge that the agreement to which reference has been made of October 9, 1917, constituted an estoppel restraining the respondent from advancing the contentions on which he otherwise relied, and the decision of the learned County Court judge on this point was given in favour of the respondent. The matter was brought on appeal from the decision of the County Court judge to the Irish Court of Appeal, and the Lords Justices reached the unanimous conclusion that the judgment of the County Court judge was wrong and ought to be reversed. Giving the best attention which I can to the question I find myself unable to agree with the conclusion of the Irish Court of Appeal. In my opinion the judgment of the learned County Court judge was right and ought to be reaffirmed.

In considering whether or not the employment here was "for the purposes of the employer's trade or business," we are to apply our minds to the circumstances of the particular case; it is neither convenient nor proper to travel beyond the facts of the particular case in an attempt to lay down general rules to govern cases which may or may not arise hereafter; and the observations which I have to make are founded upon the facts of this case and ought not to be extended beyond those facts or similar facts.

My Lords, what are the facts here? A farmer living in

a modest steading, in the middle of his farm, is under the necessity of thatching the roof of his farmhouse. It is a very frequent practice in the neighbourhood for the farmers to carry out this work themselves. The material which is used for the thatching is, of course, as everyone knows, a by-product of that which is grown upon the farms; it has itself a commercial value; be that high or be it low, it could no doubt be disposed of by the farmer if he did not require it for his own purposes, but it is the habit, as the evidence before the County Court judge abundantly established, for farmers in that neighbourhood to do their own thatching, and it is necessary to observe very closely that it would not be possible to carry out the business of farming without the provision of either a farmhouse or some substituted premises. However small be the economy of the particular farm, however rudimentary the processes by which its business is conducted, some record at least must be preserved of them; in other words, it is hardly possible to conceive of the case of a farm in which at least some office work must not be carried on, and, as Mr. Scanlan in his very ingenious and clear argument was driven to admit, the only office which he could suggest in this case would be the farmhouse, the case of which we are now considering. The result therefore is that we find a man who is earning his living by the processes of agriculture, finding himself compelled by his own rustic arts to effect a reparation in the roof of the office which is necessary for his business, and without the decent convenience of which he could not carry out his business. He provides the raw material which is required for his premises by using a commodity, itself a subject of barter in agriculture, and which he could dispose of in such a manner if he did not require it for the purpose of restoring his dwelling-house. He does not, as he has often done before and as many of his neighbours the local farmers did, carry out the repairs himself. He employs the deceased man to effect these repairs. My Lords, I am not able to conceive how the argument can be successfully put forward that a man who employs another in a task of this kind is not employing him for the purposes of his trade

H. L. (IR.)

1920

MANTON
v.
CANTWELL.
—
Lord
Birkenhead L.C.
—

H. L. (IR.) or business, and I reach—hesitating to differ from all the
1920 Lords Justices in the Irish Court of Appeal but nevertheless
MANTON quite clearly—the conclusion that the deceased man was so
v. engaged, that the decision of the County Court judge upon
CANTWELL. this point, amounting as it did to a finding of fact, was right,
Lord and that the decision of the Irish Court of Appeal must be
Birkenhead L.C. reversed.

It remains only, my Lords, to say a word upon another point, though its decision is rendered unnecessary if your Lordships think proper to adopt the course which I recommend. This point however was argued before your Lordships, and it was the subject of decision both before the County Court judge and in the Irish Court of Appeal, and therefore I make a short reference to it. It was contended by counsel for the appellant that the effect of the agreement of October 9, 1917, was to create an estoppel against the respondent, or, alternatively, that it afforded an admission which could be considered by the County Court judge as a matter of evidence. My Lords, the only observation I have to make upon that contention is this. The agreement was with different parties, it dealt with different issues, and I am aware of neither authority nor reason for raising an estoppel under such circumstances, which to be effective must be bilateral, and which would therefore be binding upon the new parties—namely, the dependants for whom and for whom alone the appellant commenced these proceedings. Under these circumstances I concur in the view of the judges below that no question of estoppel arises in this case. I do not think it necessary to make any observation upon the contention which was attempted to be founded upon the supposed admission, for I find no trace of any such contention having been advanced before the County Court judge or in the Irish Court of Appeal.

My Lords, I am of opinion that this appeal should be allowed with costs, and I move your Lordships accordingly.

VISCOUNT FINLAY. My Lords, the deceased was engaged as a casual workman, and the only question that arises on

this appeal is whether that casual employment was, using the words of s. 13 of the Act which has been already referred to, such that the deceased was "employed otherwise than for the purposes of the employer's trade or business." It is clear, owing to the wording of that part of s. 13, that where a casual workman "is employed otherwise than for the purposes of the employer's trade or business" he is not a "workman" within the meaning of the Act, and therefore that his dependants are not entitled to compensation in terms of the Act. It appears to me, my Lords, that the decision of this question turns upon a close scrutiny of the facts in each particular case when they come before the Courts for decision.

H. L. (Ir.)
1920
MANTON
v.
CANTWELL.
Viscount Finlay.

Two cases have been referred to in the English Courts about which I would like to say a word, the one of them *Alderman v. Warren* (1), and the other *Boothby v. Patrick*. (2) In the former of these two cases a publican employed a man who did casual odd jobs to take down a stove and chimney in the public bar, and while he was doing this work the man met with an accident. It was held that the man's employment, at the time of the accident, which was admittedly casual, was not "for the purposes of the employer's trade or business," and therefore not within the Act; in other words, that however desirable it might be for the business of the public house to have the stove and chimney in good order, the work of putting the stove and chimney in good order was not part of the business of the publican. I refer to that case for this reason, that in giving judgment to the effect which I have mentioned, the Master of the Rolls (Lord Cozens-Hardy) said, with regard to the two Irish cases on which great stress has been laid in the argument before your Lordships, that these cases might have been supported on the particular facts. Those two cases are *Cotter v. Johnson* (3) and *Johnston v. Monasterevan General Store Co.* (4) What the Master of the Rolls said was this: "Our attention has been called

(1) 9 B. W. C. C. 507, 510.

(3) 45 Ir. L. T. 259; 5 B. W. C. C.

(2) 11 B. W. C. C. 201.

568.

(4) 42 Ir. L. T. 268; 2 B. W. C. C. 183.

H. L. (Ir.) 1920
 MANTON v. CANTWELL.
 Viscount Finlay.

to two Irish cases which might have been supported on the particular facts of those cases, but in my opinion they cannot possibly be supported if they are supposed to lay down the principle that whatever is advantageous for improving a house, or repairing a house, used for the purposes of a business, is an employment for the purposes of the trade or business. With the greatest possible respect to the Irish Courts, if they decided that, I do not feel disposed to follow them." My Lords, I do not propose to examine the Irish cases in detail to see whether any such principle can be extracted from the decisions there given, because I agree with what the Master of the Rolls said in the passage which I have just quoted that no such principle could possibly be good in law. It cannot be that work done on premises where business is carried on, either in the way of building or in the way of repairing, can be regarded as a part of the business itself; it is work done to make the premises fit for the purposes of the business and it may be essential for carrying on the business, but it is not part of the carrying on of the business itself, and I think it would be extremely dangerous if any such principle were introduced into the law as has been contended for.

The other case, my Lords, is the case of *Boothby v. Patrick*. (1) It came before the Master of the Rolls (Sir Charles Swinfen Eady), Duke L.J. and Eve J. There the work that was being done was connected with a crane which was being removed to other premises. The Court held, on the facts, that the work was being done for the purposes of the business, and it was upon that and that only that the decision turned.

Now, my Lords, it seems to me that on the facts here what we have to find is whether on the evidence the work of thatching this cottage on which the deceased was employed can be considered as in the course of the farmer's business. My Lords, I am not going through the evidence; it is given at p. 25 and following pages of the Appendix; but it appears to me that the result of it is this, that there was evidence given that it is incidental to the business of a farmer to do

such work as thatching the house or cottage in which the farmer lives. The farm buildings here appear to have been of a very modest character, and two farmers were called who stated that such work was done by them, and a great many other farmers were present who were ready to give evidence to a similar effect, but on the judge stating that he was satisfied on that point with the evidence which had been given, these other witnesses were not called. It seems to me; my Lords, upon these facts that the County Court judge was quite justified in coming to the conclusion that it was part of the ordinary business of farms of this description in that district that the farmer should do such work himself or by his servants as was involved in the thatching of the house. The case must depend simply upon the facts of the evidence in the particular case with which we have to deal, and the only general principle which can be laid down is that if it appears that the work was in the course of the business, then the casual labourer employed to do such work for the man who is carrying on the business is within the benefit of the Act. I do not assume that the house was used for any purposes except the purpose of the residence of the farmer and his family in it; it is essential for the work of a farm that there should be a residence of that kind, and it appears to me that on the evidence here it is shown that the work of doing such repair in the way of thatching was work that was within the business of the farmer.

My Lords, I do not propose to say anything about the supposed estoppel except this, that it is absolutely clear that the right of the dependants is not in any way directly derived from the man whose death has been occasioned by an accident in the course of his employment; they recover compensation for loss of the benefit which they would have derived from the continuance of his life, but their right in itself is independent and there could be no estoppel by reason of the agreement made between the employer and the employee. I concur entirely, my Lords, in the conclusion drawn by the County Court judge as to the liability of the employer under the circumstances of this case; at the same time I think

H. L. (Ib.)
1920
MANTON
v.
CANTWELL.
Viscount Finlay.

H. L. (IR.)
1920
MANTON
v.
CANTWELL.
Viscount Finlay.

that the finding at p. 28 of the Appendix, letter E, of the County Court judge is rather wide in its terms. What he said was this: "I held that Manton having been at the time engaged on repairs to the farmhouse where the respondent lived and carried on his business as a farmer, was employed for the purpose of the respondent's trade or business." That does not seem to me accurately to state the principle. The ratio decidendi is that on the evidence in this particular case it appears that effecting such repairs to the farmhouse was a part of the farmer's trade or business, and that the casual labourer, Manton, the deceased, was therefore employed for the purposes of the trade or business of the farmer.

For these reasons I think the judgment of the Court of Appeal should be set aside and the judgment of the County Court judge restored.

VISCOUNT CAVE. My Lords, I concur. Upon the general question which has been argued I am entirely in agreement with what was said by Lord Cozens-Hardy in the case of *Alderman v. Warren*. (1) But it does not appear to me that this case raises any question of general principle, and I base my conclusion upon this, that there was evidence before the County Court judge upon which he could find that the deceased was employed for the purposes of the respondent's business. This being so, and there being such evidence, I think that his decision should have been allowed to stand; and, accordingly, that this appeal should be allowed.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I concur. The question is whether the job on which the deceased was employed as a casual worker was "for the purposes of the employer's trade or business."

I decline to be bound by any general propositions of so-called principle or law in cases of which this is an example: such propositions, for instance, as, first, that it is sufficient that

the job was done upon the business premises ; or, second, that it fails to be sufficient because the part of the premises on which the job was being done was also used for the accommodation either of the employees or the employer himself. For, my Lords, in such cases the question is always, or nearly always, a question of degree and of fact.

H. L. (IR.)
1920
MANTON
v.
CANTWELL.
Lord Shaw of
Dunfermline.

I have no desire to suggest any doubt of the soundness on the one hand of *Alderman v. Warren* (1), where the job was held to be "for the purposes of the employer's trade or business," or, on the other, of *Boothby v. Patrick* (2), where the job was held not to be so. Between these points, my Lords, may lie many stages of connection of the job with the trade. On these stages the judgment of the arbitrator must have very great weight. In this case the arbitrator held that the thatching of the small farmhouse, which was often done by the farmer himself, or upon which any ordinary farm hand might be turned, was a job which was intimately connected with the trade or business of the farm. My Lords, I do not differ from him ; on the contrary I agree with him.

The leading idea enforced in the Court of Appeal was that the farmer's dwelling was used for domestic purposes. No doubt it was ; but it may for all that have been used for many of the humbler tasks and accommodations of the business, and indeed without the house the reasonable conduct of the business would have been impossible. I cannot see that the learned County Court judge in any way misdirected himself by taking the whole of these things into consideration and adjudging the balance of fact to be that the job in question was "for the purposes of the employer's trade or business."

*Order of the Court of Appeal in Ireland reversed
and award of the County Court judge restored.
The respondent to pay the costs in the Court of
Appeal in Ireland, and also the costs of the
appeal to this House, such last-mentioned*

(1) 9 B. W. C. C. 507.

(2) 11 B. W. C. C. 201.

H. L. (IR.)

1920

MANTON

v.

CANTWELL.

*costs to be taxed in the manner usual when
an appellant sues in forma pauperis.*

Lords' Journals, April 19, 1920.

Solicitors for the appellant: *Berry Tompkins & Co., for
L. J. Ryan, Thurles.*

Solicitors for the respondent: *F. J. Berryman, for John P.
Carrigan, Thurles.*

* H. L. (E.)

[HOUSE OF LORDS.]

1920

May 4.

HUTCHINSON APPELLANT ;

AND

NATIONAL REFUGES FOR HOMELESS }
AND DESTITUTE CHILDREN AND } RESPONDENTS.
OTHERS }

*Will—Construction—Gift to such Persons as on Failure of preceding Trusts
“shall be my next of kin and entitled to my personal estate under the
Statutes of Distribution”—Period of ascertaining Class.*

Testator gave his residuary personal estate upon trust, after the death or remarriage of his wife, for his three daughters and their respective children in equal shares with cross limitations between them, and directed that “on the failure of all the trusts hereinbefore declared of the residue of my personal estate, such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the Statutes for the Distribution of the Personal Estates of Intestates, such persons if more than one to take distributively according to the said statutes” :—

Held, that the ultimate gift of residue was in favour of those persons who would have been the next of kin of the testator under the Statutes of Distribution if he had died at the date of the failure of the antecedent trusts.

Bullock v. Downes (1860) 9 H. L. C. 1; *Mortimore v. Mortimore* (1879) 4 App. Cas. 448, and *In re Wilson* [1907] 2 Ch. 572 distinguished.

Wharton v. Barker (1858) 4 J.K. & J. 483, *Sturge and Great Western*

* *Present*: VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and LORD MOULTON.

Railway Co. (1882) 19 Ch. D. 444. *In re McFee* (1910) 79 L. J. (Ch.) 676, *In re Helsby* (1914) 84 L. J. (Ch.) 682, and *In re Mellish* [1916] 1 Ch. 562 followed.

Decision of the Court of Appeal [1919] 2 Ch. 17 reversed.

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.

APPEAL from an order of the Court of Appeal (1) affirming an order of P. O. Lawrence J.

The facts, which are fully stated in the report of the case before the Court of Appeal, may be summarized as follows :—

By his will dated March 27, 1852, William Hutchinson gave his residuary personal estate upon trust for his wife during widowhood, and then upon trust in equal thirds for his three daughters for life, with remainder to their children and with cross gifts between them; and the will continued :—

“ And I do further direct that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the Statutes for the Distribution of Estate of Intestates, such persons if more than one to take distributively according to the said Statutes.”

In the events which happened the failure of the specific trusts occurred on the death in 1918 of Sarah, the last surviving daughter of the testator.

The question for decision was whether the next of kin referred to in the ultimate trust were to be ascertained at the date of the testator's death or at the period of distribution.

P. O. Lawrence J. held that the class of next of kin to take were the persons entitled under the Statutes of Distribution and to be ascertained at the death of the testator, and not at the date of the failure of the trusts, and his decision was affirmed by the Court of Appeal (Swinfen Eady M.R., Scrutton L.J. and Eve J.).

The appellant represented the persons who if the testator had died on the failure of the antecedent trusts of the will

H. L. (E.) would be the next of kin of the testator according to the Statutes of Distribution. The first named respondents represented the statutory next of kin of the testator at the date of his death.

HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.

1920. March 22, 23. *Jenkins K.C.* and *Preston K.C.* for the appellant.

This is a gift to an artificial class of persons to be ascertained at a future period—namely, on the failure of the previous trusts of the will—and the concluding words of the clause were inserted to distinguish between the next of kin at common law and the next of kin under the Statutes of Distribution: see *Withy v. Mangles*. (1) It is a gift to those who would be the statutory next of kin of the testator if he had died on the failure of the previous trusts. The Court of Appeal treated the case as covered by authority, but the authorities relied upon by the Court are distinguishable. *Bullock v. Downes* (2) does not decide that whenever the testator uses the words “entitled under the statute” the class is to be ascertained at the testator’s death, but it lays down a prima facie rule of construction only which will yield to a contrary indication of intention by the testator; and in that case the testator stated his own hypothesis for he uses the words “in case I had died intestate.” If those words had occurred here there would have been no room for the appellant’s argument. *Mortimer v. Slater* (3) affirmed by this House sub nom. *Mortimore v. Mortimore* (4) was treated both by the Court of Appeal and by this House as indistinguishable from *Bullock v. Downes*. (2) No doubt, if James L.J.’s account of the ratio decidendi of *Bullock v. Downes* (2) is an exhaustive statement of the case the appellant is out of court; but the Lord Justice misconceived the effect of that decision and treated it as going further than it did. On the other hand, the appellant relies upon the classification of the authorities made by Thesiger L.J. in the same case. The first class is where the word “then,”

(1) (1843) 10 Cl. & F. 215.

(2) 9 H. L. C. 1.

(3) (1877) 7 Ch. D. 322.

(4) 4 App. Cas. 448.

the adverb of time, is attached to the description of the class of persons to take. In that case the word "then" imports that the class is to be ascertained at the time so pointed out—i.e., the period of distribution. The second class is where words of futurity, but without the adverb of time, are attached to the description of the class, and there the words speak from the time of the testator's death. The third class is where the word "then" is used, not in connection with the description of the class, but in connection with the time at which the estate is to be enjoyed. There too the class of beneficiaries is to be ascertained at the testator's death. *Bullock v. Downes* (1) did not lay down any settled rule of construction as to the meaning of the word "then" and it contains nothing which touches upon what the Lord Justice said as to the meaning of that word. Indeed, a careful scrutiny of *Bullock v. Downes* (1) shows that if the word "then" in the will under consideration in that case had been transposed and applied to the ascertainment of the class the decision would have been the other way. Thesiger L.J.'s classification has never been questioned in any subsequent case, and it must be treated as law. This case falls under the first of the three classes. It is true that the word "then" is not used, but the expression "On the failure of the trusts herein-before declared" is equivalent to "then." That expression, when it first occurs, refers to the creation of the estate, but, when it occurs the second time, it plainly refers to the ascertainment of the class. In *Mortimore's Case* (2) the word "then" was attached to the payment and not to the class who were to receive payment. *In re Wilson* (3) again is treated as covered by *Bullock v. Downes*. (1)

In *Hood v. Murray* (4) Lord Watson accurately defines the rule to be derived from *Bullock v. Downes* (1) and *Mortimore's Case*. (2) "The rule," he says, "is simply this, that in cases where a testator or settlor, in order to define

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.

(1) 9 H. L. C. 1.

(3) [1907] 1 Ch. 450; [1907]

(2) 7 Ch. D. 322; 4 App. Cas. 448.

2 Ch. 572.

(4) (1889) 14 App. Cas. 124, 137.

H. L. (E.) the persons to whom he is making a gift, employs
 1920 language commonly descriptive of a class ascertainable
 HUTCHINSON at the time of his own death, he must prima facie, and
 v. in the absence of expressions indicating a different
 NATIONAL intention, be understood to refer to that period for the
 REFUGES selection of the persons whom he means to favour," and he
 FOR adds that "the rule has no other effect than to attribute
 HOMELESS to the words used their natural and primary meaning, unless
 AND that meaning is displaced by the context."
 DESTITUTE
 CHILDREN.

This was a purely contingent gift and the class has to be ascertained at a future time. The testator cannot have intended to give to persons who ex hypothesi were dead.

The construction indicated by the appellant, the artificial class construction, has been adopted in several cases, where the context requires it. *Wharton v. Barker* (1); *Sturge and Great Western Railway Co.* (2); *In re McFee* (3); *In re Helsby* (4); *In re Mellish*. (5) Those cases are indistinguishable in principle from the present case. Apart from authority it cannot be doubted that the true construction is that for which the appellant contends, and there is no authority which militates against that construction.

Ward Coldridge K.C. and *Sheldon* for the first-named respondents. It is a natural thing for a testator on the failure of the specific trusts to leave his property at the disposal of his statutory next of kin: *Ware v. Rowland*. (6) The question is: Is that what the testator has done in this case or has he given his property to an artificial class to be ascertained at the period of distribution? The expression here used is "entitled under the Statutes." That must mean that the class of legatees must be ascertained at the testator's death, for the only persons who can show a title to the testator's personal estate under the Statutes of Distribution are the persons who at the date of the testator's death are his next of kin under those statutes.

The use of the word "entitled" is sufficient to negative

(1) 4 K. & J. 483.

(2) 19 Ch. D. 444.

(3) 79 L. J. (Ch.) 676.

(4) 84 L. J. (Ch.) 682.

(5) [1916] 1 Ch. 562.

(6) (1847) 2 Ph. 635, 639.

the notion of an artificial class: Hawkins on Wills, 1st ed., pp. 99-101; Jarman on Wills, 6th. ed., vol. ii., p. 1649; Theobald on Wills, 6th. ed., p. 336. If the testator had indicated that the class was to be ascertained on the footing that he had died intestate at the date of the failure of the trusts there would have been nothing more to be said, but this will contains no such indication.

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.

The statement of the law by James L.J. in *Mortimore's Case* (1) is directly in point. That statement was quoted by Parker J. in *In re Wilson* (2), and on appeal Farwell L.J. stated the law in the same way. (3) *Cable v. Cable* (4) and *Wheeler v. Addams* (5) are earlier decisions to the same effect. This case is concluded by *Bullock v. Downes* (6) and *Mortimore v. Mortimore*. (7)

Lavington for the trustees of the will.

Jenkins K.C. replied.

The House took time for consideration.

May 4. VISCOUNT FINLAY. My Lords, this case raises a point on the construction of the will dated March 27, 1852, of William Hutchinson who died on June 3, 1855. The question is whether the residuary bequest is to be construed as in favour of the next of kin of the testator to be ascertained at the time of his death or whether it is in favour of those who would have been the next of kin if his death had taken place at the time when the antecedent interests under the will expired.

The testator left a widow who died on August 24, 1870, and three daughters, Elizabeth who died in September, 1898, Frances who died on April 13, 1911, and Sarah who died on January 11, 1918, none of them leaving any issue. Claim is made to the residue by a Charity under the will of Sarah, who was one of the next of kin of the testator on his decease. The appellant is a grandson of Ann Hutchinson, a sister

(1) 7 Ch. D. 322, 327.

(2) [1907] 1 Ch. 450, 462.

(3) [1907] 2 Ch. 572, 576.

(4) (1853) 16 Beav. 507.

(5) (1853) 17 Beav. 417.

(6) 9 H. L. C. 1.

(7) 4 App. Cas. 448.

H. L. (E.) of the testator, and would be one of the next of kin of the
 1920 testator if by the terms of the will that class should be ascer-
 HUTCHINSON tained as at the death of Sarah in 1918. P. O. Lawrence J.
 v. decided in favour of the Charity and he was affirmed by
 NATIONAL the Court of Appeal.
 REFUGES
 FOR

HOMELESS The will provided for an annuity to the widow of the
 AND testator and gave interests in the residue of the property
 DESTITUTE to the three daughters of the testator and their issue with
 CHILDREN. cross remainders and then proceeded as follows: "And I
 Viscount Finlay. do further direct that on failure of all the trusts herein-
 before declared of the residue of my personal estate such
 residue shall be in trust for such person or persons as on the
 failure of such trusts shall be my next of kin and entitled
 to my personal estate under the Statutes for the Distribution
 of the personal Estates of Intestates such persons if more
 than one to take distributively according to the said
 Statutes."

It was urged for the appellant that this clause shows that
 the class of next of kin is to be ascertained as on the death
 of Sarah, the last surviving daughter. The respondents,
 on the other hand, contended that the words of the clause
 leave the class of next of kin to be ascertained in the usual
 manner at the death of the testator. There are a great
 many authorities upon the construction of such clauses,
 many of which have been cited to your Lordships. The
 leading case is *Bullock v. Downes*. (1) The will in that case
 created trusts in favour of the son of the testator for life and
 afterwards in favour of his children, and in case there should
 not be any child of the son "then to stand possessed of the
 same in trust for such person or persons of the blood of me
 as would by virtue of the Statutes of Distribution of In-
 testates' Effects have become and been then entitled thereto
 in case I had died intestate." The decision of the House
 (Lord Campbell, L.C. Lord Brougham, Lord Cranworth,
 Lord Wensleydale and Lord Kingsdown) was that the persons
 entitled were to be ascertained at the death of the testator
 and that the interest of the son as one of those persons was

(1) 9 H. L. C. 1.

not affected by the previous gift of a life interest in the whole of the residue and passed to his personal representatives. The whole effect of the decision is stated in a few sentences in the judgment of the Lord Chancellor, Lord Campbell, as follows (2) :—

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
Viscount Finlay.

“It seems to me quite clear that upon the just construction of this will the personal representatives of the testator’s son were, in the events which happened, entitled to a share of the personal property in question; the son, having been one of the blood, or next of kin of the testator, who at the testator’s death would, by virtue of the Statute of Distributions, have been entitled thereto in case the testator had died intestate. Generally speaking, where there is a bequest to one for life, and after his decease to the testator’s next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Gifts to a class following a bequest of the same property for life vest immediately upon the death of the testator. Nor does it make any difference that the person to whom such previous life interest was given is also a member of the class to take on his death. . . . There may be, as in the last case of *Wharton v. Barker* (1) before Vice-Chancellor Page Wood, a clear indication in the will that notwithstanding the use of such expressions, the time for ascertaining the class is the time fixed by the will as the period of distribution. But in the will now to be construed nothing appears to indicate an intention in the testator contrary to the general rule; and on the contrary the second ‘then’ in this limitation seems expressly to refer to the time of the testator’s death as the period when the class was to be ascertained.”

Bullock v. Downes (2) therefore decides that, prima facie, the next of kin are to be ascertained at the death of the testator, but, that if there is a sufficient indication to that effect in the words of the will, the time for ascertaining the

(1) 9 H. L. C. 12, 13.

(2) 4 K. & J. 483.

H. L. (E.) class may be the time fixed by the will as the period of
 1920 distribution. The question in this as in every other case
 HUTCHINSON of the kind must be whether there is in the will a sufficient
 v. indication that the period of distribution is the time at which
 NATIONAL the class is to be ascertained.
 REFUGES
 FOR
 HOMELESS Your Lordships are indebted to the counsel in the case
 AND for the selection which has been made from the multitude
 DESTITUTE of authorities of a certain number of typical cases. Taken
 CHILDREN. in chronological order these cases are as follows:—
 Viscount Finlay.

(1.) (1858) *Wharton v. Barker*. (1)

(2.) (1877) *Mortimer v. Slater* (2) and S. C. sub nom. (1879);
Mortimore v. Mortimore. (3)

(3.) (1882) *Sturge and Great Western Railway Co.* (4)

(4.) (1907) *In re Wilson*. (5)

(5.) (1910) *In re McFee*. (6)

(6.) (1914) *In re Helsby*. (7)

(7.) (1916) *In re Mellish*. (8)

The first of these cases, *Wharton v. Barker* (1), is of great value, as it contains a very thorough investigation by Wood V.-C. of all the authorities up to 1858, and the other cases in the list give a view of the state of the authorities down to 1916. It would be useless to go through these cases in detail. It is a question of construction in each case whether the class is to be ascertained at the death of the testator or at a later date. It is for those who assert that the class is to be ascertained at a date other than that of the death of the testator to show that this is the fair result of the language of the will. If by the use of an adverb of time or otherwise the will shows that the class is to be ascertained on the death of the holder of some antecedent interest, this settles the point.

I turn at once to the consideration of the clause in the will on which the determination of this case must turn. That clause directs what is to be done "on failure of all the trusts

(1) 4 K. & J. 483.

2 Ch. 572.

(2) 7 Ch. D. 322.

(6) 103 L. T. 210; 79 L. J. (Ch.)

(3) 4 App. Cas. 448.

676.

(4) 19 Ch. D. 444.

(7) 84 L. J. (Ch.) 682.

(5) [1907] 1 Ch. 450; [1907]

(8) [1916] 1 Ch. 562.

hereinbefore declared of the residue of my personal estate." H. L. (E.)
 That event has happened by the death of Sarah, the last 1920
 of the daughters of the testator, without issue. The clause HUTCHINSON
 goes on to provide that in that event "such residue shall v.
 be in trust for such person or persons as on the failure of NATIONAL
 such trusts shall be my next of kin and entitled to my per- REFUGES
 sonal estate under the statutes for the distribution of the FOR
 personal estates of intestates such persons if more than one HOMELESS
 to take distributively according to the said statutes." The AND
 reference for the second time to "the failure of such DESTITUTE
 trusts" is to be noted. In the words "for such person or CHILDREN.
 persons as on the failure of such trusts shall be," etc., the Viscount Finlay.
 phrase "on the failure of such trusts" must denote the time
 at which the next of kin are to be ascertained. "On the
 failure of such trusts" in this connection is exactly equiva-
 lent to "then." In the event of failure of the antecedent
 trusts the residue is to go to such persons as *then* answer the
 description given in the clause. What is that description?
 It is "my next of kin and entitled to my personal estate
 under the 'Statutes' for Distribution." Great stress was
 laid by the respondents upon these last words. It was
 urged that no one can be entitled under the Statutes of Dis-
 tribution except the next of kin on the death of the testator,
 and that these words showed that the testator had in view
 the next of kin under the statutes at the time of his death.
 It was argued that these words did away with the inference
 which otherwise might have been drawn from the earlier
 words in the clause that the class was to be ascertained at
 the date of the failure of the antecedent trusts. I cannot
 attribute any such force to these words. It appears to me
 that what they mean is that the next of kin to be ascertained
 as on the failure of the earlier trusts are to be the next
 of kin according to the Statutes of Distribution. Without
 some such words the trust for next of kin would have been
 read as denoting next of kin at common law and not accord-
 ing to the statute: *Withy v. Mangles* (1); and see Vaughan
 Hawkins on The Construction of Wills, p. 97 and following

(1) 10 Cl. & F. 215.

H. L. (E.) pages. These words are merely part of the definition of the class as being next of kin according to the statute and not at common law. The reference to "the failure of such trusts" as the point of time at which the class is to be ascertained is clear and definite, and to read the words "entitled to my personal estate under the statutes" as denoting the next of kin at the death of the testator would make the clause repugnant to itself.

1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
—
Viscount Finlay.

The clause goes on to deal with the manner in which the members of the class are to take—"such persons if more than one to take distributively according to the said statutes." These last words to me seem somewhat to militate against the respondents' contention. If the class denoted by the earlier words had been the next of kin at the death of the testator they would as a matter of course have taken distributively as under the statutes. The last words would in that case have been unnecessary, but they come in naturally in dealing with an artificial class of next of kin with reference to the date at which the earlier trusts fail, and provide that the members of the class are to take according to the statute as tenants in common and not as at common law as joint tenants.

Great reliance was placed by the respondents upon the decision in the second case in the list, *Mortimer's Case* (1), in the Court of Appeal and in the House of Lords. But the words in that case are very different from those in the present. There the clause ran, "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates."

James L.J. said (2): "The words are, 'the same shall be paid to such persons as will then be entitled,' that is, to the persons to whom the law would give it. The expression does not denote the persons to whom the law under certain contingencies would give the title, but the persons who can allege themselves to be entitled under the statute. That

(1) 7 Ch. D. 322; 4 App. Cas. 448.

(2) 7 Ch. D. 327.

was the ratio decidendi in *Bullock v. Downes*. (1) It appears to me to be plain that to satisfy that expression you must have a person who can show a title under the Statute of Distributions, and the only persons who can show a title under the Statute of Distributions are the persons who were next of kin at the death of the testator (who was partially intestate) or the persons who represent them." And he held that to satisfy such words "the claimants must show an actual title under the Statute of Distributions."

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
Viscount Finlay.

In the House of Lords Lord Cairns L.C. said (2) that the words amounted to this: "At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next of kin at the time of his death."

Lord Blackburn said (3) that it was even a clearer case than *Bullock v. Downes*. (1)

In the present case, for the reasons I have given in dealing with the language of the clause, I think that the reference is, to borrow Lord Cairns' expression, to an artificial class of next of kin to be created.

Hall V.-C. in *Sturge and Great Western Railway Co.* pointed out (4) that the judgment of James L.J. in *Mortimer's Case* (5) depended upon the particular expressions used, and held (I borrow the language of the headnote) that where a testator gives property in trust for the benefit of the persons who at a time subsequent to his own death shall by virtue of the Statute of Distributions be his next of kin the class is an artificial class to be ascertained on the hypothesis that the testator lived up to and died at the subsequent period of time. The words used in the will in *In re Wilson* (6) appear to me to be indistinguishable from those upon which *Mortimer's Case* (5) was decided.

In *McFee's Case* (7), as also in the case of *In re Helsby* (8), the bequest was to the persons who at the time should be

(1) 9 H. L. C. 1.

(2) 4 App. Cas. 452.

(3) Ibid. 453

(4) 19 Ch. D. 449.

(5) 7 Ch. D. 322.

(6) [1907] 1 Ch. 450; [1907] 2 Ch.

572.

(7) 103 L. T. 210; 79 L. J. (Ch.)

676.

(8) 84 L. J. (Ch.) 682.

H. L. (E.) the testator's next of kin according to the Statute of Distribution, 1920, and it was held that the class was an artificial class to be ascertained on the hypothesis that the testator had lived up to the time in question.

HUTCHINSON v. NATIONAL HOMELESS AND DESTITUTE CHILDREN.
I construe the clause in the present case as having exactly the same meaning as the clauses in the two cases to which I have just referred.

Viscount Finlay.

In the case of *In re Mellish* (1) the bequest was in favour of the person or persons who at the decease of the survivor of certain beneficiaries under the will "shall be of the blood of my said son George Mellish and of kin to him and who under the Statutes of Distribution of Intestates' Effects would be entitled to his personal estate if he were dead unmarried and intestate such persons if more than one to take in the portions prescribed by the same statute." Neville J. held that the gift was to an artificial class consisting of the next of kin of George Mellish to be ascertained as if he had died on the death of the life tenant.

Such authorities are of value chiefly as calling attention to the points on which the construction of any particular will must turn. We always come back to the particular words employed in the will in each case. In my opinion the words of the present will are reasonably clear and bear the meaning contended for by the appellant. They do not in my judgment point to the class who were entitled on the death of the testator but to an artificial class to be determined at the date of the failure of the trusts in the will.

In my opinion the judgments below should be reversed. Costs of all parties to be paid out of the estate.

VISCOUNT CAVE. My Lords, the testator at the date of his will was 59 years of age, and had living a wife and three daughters, but no other issue. By his will dated March 26, 1852, he gave his residuary estate to trustees upon trust for his wife for life, and subject thereto upon trust in equal thirds for his three daughters for life with remainder to their

(1) [1916] 1 Ch. 562.

children and with cross gifts between them ; and the will proceeded as follows :—

“ And I do further direct that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the Statutes for the Distribution of the personal estates of Intestates such persons if more than one to take distributively according to the said Statutes.”

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
Viscount Cave.

The testator died in the year 1855, and his widow in 1870 ; and the last survivor of his three daughters died in 1918. None of his daughters had issue. The question raised in this case is whether the “ next of kin ” referred to in the ultimate trust above set out are to be ascertained at the date of the testator’s death or at the period of distribution, that is to say, at the date of the death of the last survivor of the three daughters.

My Lords, upon this question, if I had been concerned simply with the terms of the will and had been unembarrassed by the decisions pronounced in similar cases, I should not have entertained any doubt. If there had been no such antecedent authorities, I should have said without hesitation that the testator intended his ultimate gift to benefit persons living at the time when the preceding trust failed to take effect, that the persons to be so benefited were those who at that time might be his nearest of kin, but that those nearest of kin were to be ascertained not by mere proximity in blood but in accordance with the scheme of the Statute of Distribution, and were to take in shares to be ascertained in like manner. I should accordingly have pronounced in favour of the persons who would have been the testator’s next of kin under the statute if he had died at the period of distribution.

But P. O. Lawrence J. and the Court of Appeal have held the case to be concluded by authority, and have determined the question in favour of the testator’s statutory next of kin at his death ; and it is therefore necessary to consider

H. L. (E.) carefully the authorities upon which their decision was based. For if those authorities have laid down any rule or canon of construction which binds this House, it should of course be followed.

1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
Viscount Cave.

The authorities principally relied upon for the respondents are two decisions in this House—namely, *Bullock v. Downes* (1) and *Mortimore v. Mortimore*. (2) In *Bullock v. Downes* (1) the words to be construed were: "Such person or persons of the blood or next of kin of me, the said Andrew Downes, as would, by virtue of the Statutes of Distribution of Intestates' Effects, have become and been then entitled thereto in case I had died intestate." In *Mortimore v. Mortimore* (2) the words were: "Such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates."

In each of these cases, therefore, the class of persons to take under the gift was to consist of persons entitled under the statute, and this was to be their primary qualification; and in each case the word "then" contained in the gift was capable of being held, and was in fact held to refer, not to the time when the class was to be ascertained, but to the time when the next of kin in question would come into the enjoyment or receipt of the fund. That this was in each case the reason of the decision of this House appears from a consideration of the judgments delivered. In *Bullock v. Downes* Lord Cranworth expressed the reasons for his decision as follows (3): "Even assuming that the word 'then,' as connected with the word 'entitled,' is to be read as an adverb of time, still the time indicated is not the time of the death of the testator, but the time when the persons would come into the enjoyment of that which is bequeathed to them. The legatees to take on the son dying without issue are not the persons who would have been entitled if the testator had *then* died, but those who would *then* be entitled if the testator, when he died, had died intestate." And in *Mortimore v. Mortimore* Lord Cairns expressed a similar

(1) 9 H. L. C. 1.

(2) 4 App. Cas. 448.

(3) 9 H. L. C. 19.

view in the following words (1): "Now, I am quite willing to look at the word 'then' as if it meant at the expiration of the preceding limitation, but then what does this amount to? Why, this. At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next of kin at the time of his death." It is evident from the judgments of Hall V.-C. in *Sturge and Great Western Railway Co.* (2), and of Parker J. in *In re Wilson* (3) that those learned judges took a similar view as to the ratio decidendi in *Bullock v. Downes* (4) and *Mortimore v. Mortimore*. (5)

H. L. (E.
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
—
Viscount Cave.

In the present case the elements which determined the decisions in the above-mentioned two cases are not to be found. The gift is not to those persons entitled under the statute who at the date of distribution may be entitled to receive the fund, but to those persons who on the failure of the preceding trust, that is to say at the time of distribution, shall be the testator's next of kin; and unless the will is to be held as self-contradictory, the words "and entitled," etc., which follow must be read not as defining the class to take, but only as determining the manner in which the next of kin are to be ascertained. If so, this case is similar to *Wharton v. Barker* (6), where the words were: "Unto the person or persons that shall then be considered as my next of kin and personal representative or representatives agreeable to the order of the Statutes of Distribution." In that case it was held that the persons to take were an artificial class to be ascertained at the time of distribution; and a similar result was reached in *In re McFee* (7); *In re Helsby* (8), and *In re Mellish*. (9)

For the above reasons I am of opinion that the order under appeal should be reversed, and that it should be declared that upon the true construction of the will of the testator

(1) 4 App. Cas. 452.

(2) 19 Ch. D. 444.

(3) [1907] 1 Ch. 450.

(4) 9 H. L. C. 1.

(5) 4 App. Cas. 448.

(6) 4 K. & J. 483.

(7) 79 L. J. (Ch.) 676.

(8) 84 L. J. (Ch.) 682.

(9) [1916] 1 Ch. 562.

H. L. (E.) William Hutchinson the next of kin therein designated to
 1920 take the residue of his personal estate on the failure of the
 HUTCHINSON trust thereby declared by his will in favour of his daughters
 v. and their children must in the events that have happened
 NATIONAL be ascertained as at the date of the death of his surviving
 REFUGES daughter Sarah Hutchinson. The costs of all parties here
 FOR and below should be taxed as between solicitor and client
 HOMELESS and paid out of the testator's estate.
 AND
 DESTITUTE
 CHILDREN.

Viscount Cave.

LORD DUNEDIN (read by VISCOUNT CAVE). My Lords, much authority has been and can be cited from cases which bear more or less resemblance to this. I do not think it necessary to advert to any except to the well-known list of classes of cases given by Thesiger L.J. in his judgment in *Mortimer v. Slater*.⁽¹⁾ Now, the clause to be here construed first of all prescribes the time at which the succession in question is to open. It is "on the failure of the trusts hereinbefore declared," then the deed goes on to specify the class; it is "to such person or persons as on the failure of such trusts shall be my next of kin, etc." It is, I think, clear that this second repetition of "on the failure of such trusts" is exactly equivalent to the adverb "then." That being so, it brings it within the first of Thesiger L.J.'s classes, where the adverb "then" imported that the class was to be ascertained at the time so pointed out—i.e., at the period of distribution—and it makes it impossible to hold that it falls within the third class where the adverb is used "not in connection with the description of the class, but in connection with the time at which the estate is to come into being," for the function of determining when the estate was to come into being has been already fulfilled by the first set of words "on the failure of such trusts."

Then it is said that the sentence does not stop with the words "next of kin," but goes on to say "entitled to my personal estate under the Statutes for the Distribution of Personal Estates of Intestates," and appeal is made to the opinion of James L.J. in the same case to the effect that these

(1) 7 Ch. D. 322.

words mean someone who has an active title under the statute, who can only be one of a class ascertained at the death of the testator. In that case, however, there was no feature like the repetition of the words "on the failure of such trusts," and accordingly the function of the word "then" to designate the opening of the succession had not been exhausted. It seems to me, therefore, a more natural reading to hold in the present case that the reference to the Statute of Distributions is not for the purpose of insisting on the condition of an active title on the part of the recipient, but to distinguish between the next of kin at common law and the next of kin under the rules of this statute.

H. L. (E.)
1920
HUTCHINSON
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
Lord Dunedin.

I therefore concur in the judgment proposed.

LORD ATKINSON. My Lords, the facts have already been stated.

In *Hood v. Murray* (1) Lord Watson in a judgment concurred in by Lords Halsbury and Macnaghten, lays down, with his accustomed clearness and precision, the rule of construction established by the case of *Bullock v. Downes* (2) and *Mortimore v. Mortimore*. (3) The rule, he said, as he understood it, was simply this, that "in cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death, he must prima facie, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion, the rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context." In several of the cases cited expressions were found in the document to be construed sufficient to express an intention of the settlor or testator different from this primary intention, and in others insufficient for that purpose. The question for decision in the present case is to which of these two classes

(1) 14 App. Cas. 124, 137.

(2) 9 H. L. C. 1.

(3) 4 App. Cas. 448.

H. L. (E.) does the case belong? In the present case the testator directs, that on failure of all the trusts thereinbefore declared of the residue of his personal estate, something is to be done with that residue. It is this. It is to be held in trust for such person or persons as on *the failure of such trusts* shall be the testator's next of kin. Stopping there for a moment, it would appear to me that the words "as on the failure of such trusts" indicate a point of time. They are equivalent to the words "at the time when the failure already mentioned occurs," or words to that effect. Their meaning might be effectually expressed by the adverb of time "then," so that the clause would run—"And I further declare that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be held in trust for such person or persons as *then* shall be my next of kin." The authorities, I think, establish that if the word "then" had been thus used it would be held that the next of kin the testator had intended to benefit were those who would answer that description if he had died on the day the failure of all the trusts had occurred.

In *Wharton v. Barker* (1) the clause in the testator's will upon which the question in controversy turned ran thus: "And in case both my said daughters should die without issue, or, leaving such, all should die under twenty-one without leaving issue, *then*, I direct my trustees to pay one moiety unto the person or persons, that shall *then* be considered as my next of kin and personal representative or representatives agreeable to the order of the Statutes of Distribution, and the other moiety unto the person or persons that shall *then* be considered the next of kin and personal representative or representatives of my late wife Sarah, agreeable to the order of the Statutes of Distribution." At the date of the will his daughter Sarah was the only child and sole next of kin of his late wife Sarah. This daughter survived the testator and died without issue. It was held that the persons entitled to the second moiety were those who at the death of the surviving daughter were the next

(1) 4 K. & J. 483.

of kin (according to the statute) of the deceased wife, and that, having regard to the juxtaposition of the bequests, the persons entitled to the first moiety were those who, at the same period, were next of kin (according to the statute) of the testator.

It is obvious that the word "then" at the place where it first occurs meant "in that event" and in both the other places it was an adverb of time, meaning "at that time." Sir W. Page Wood, as he then was, when delivering judgment, after having reviewed all the then existing authorities, is reported to have said (1) : "In this state of the authorities I find it recognised in all the decisions, that if, in a gift to 'next of kin' without referring to their claiming as under an intestacy, the word 'then' occurs as an adverb of time, referring to the death of the tenant for life or other event fixed as the period of distribution, that circumstance is conclusive evidence that the testator did not intend the general rule of construction to apply. In the cases before the Master of the Rolls" (*Cable v. Cable* (2) and *Wheeler v. Addams* (3)), "the Court was of opinion, from the context, that it was not so used, and must of necessity be construed to mean 'thereupon' 'in that event,' so as to mark the conjunction of circumstances; but here I am absolutely precluded from considering the word 'then' in the clause 'unto the person or persons who shall *then* be considered as the next of kin' as marking the conjunction of circumstances, by the fact that the same word has previously been used in that sense in the earlier part of the sentence, '*then* I direct that my said trustees, &c.' So that no possible sense can be given to the word when it occurs the second time, unless it be read as an adverb of time." The principle of construction thus laid down in this case has been many times emphatically approved of and acted upon. In *Travis v. Taylor* (4) a testatrix left real and personal estate upon trust, after the death of her sister, to pay the income thereof to her niece during her life, and after her death to stand possessed of the said estate in trust

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
—
Lord Atkinson.
—

(1) 4 K. & J. 501.

(2) 16 Beav. 507.

(3) 17 Beav. 417.

(4) (1866) 12 Jur. (N. S.) 791.

H. L. (E.) for her children, if any, and in case of her leaving no children
 1920 *then* for such person or persons as should *then* be her next
 HUTCHINSON of kin, in a course of administration according to the Statute
 v. for the Distribution of Intestates' Personal Effects. The
 NATIONAL testatrix died in 1842, her sister in 1854, and her niece, child-
 REFUGES less, on May 15, 1863. Here the word *then* is obviously
 FOR used in two senses. Where it first occurs it means "in that
 HOMELESS event" and where it occurs for the second time it must mean
 AND "at that time." It would not make sense of the pro-
 DESTITUTE vision to give it the meaning of "in that event" in the latter
 CHILDREN. case. It was held by Kindersley V.-C. that the general rule
 Lord Atkinson. did not apply, and that the persons to take would be the
 testator's next of kin at the date of his niece's death. In
 delivering judgment the Vice-Chancellor said: "The general
 rule is that where property is given to the next of kin, the
 next of kin must *prima facie* be those who are so at the time
 of the death of the testatrix. It appears to me, however,
 when I consider the terms of this will and compare them
 with those in *Wharton v. Barker* (1) that the reasoning of
 Vice-Chancellor Wood there applies more fully to this case."
 Kindersley, V.-C. moreover, points out that in *Bullock v.*
Downes (2) the Lord Chancellor expressly referred to *Wharton*
v. Barker (1) and did not disapprove of it.

In *In re Morley's Trusts* (3) the testator gave his residuary
 personal estate to his wife for life and after her death
 directed his trustees to pay and divide three-fifths of the
 residue amongst such persons as under the Statute of Dis-
 tributions would have become entitled, on his late father's
 side at the death of his wife if he had died intestate, and as
 to the remaining two-fifths in similar terms, to his next of
 kin on his mother's side. Malins V.-C. held that the period
 for ascertaining the class to take was the date of the death
 of the testator's widow, and not that of the testator himself,
 pointing out that his decision was in strict accordance with
Wharton v. Barker (1), and not in conflict with the general
 rule laid down in *Bullock v. Downes* (2), in which there were

(1) 4 K. & J. 483.

(2) 9 H. L. C. 1.

(3) (1877) 25 W. R. 825.

no words pointing to futurity, as there were in the case he was deciding. In the case of *In re Taylor* (1) certain property was directed to be held by trustees in the events which happened, "in trust for such person or persons as under the Statutes for the Distribution of the Estates of Intestates shall, exclusive of my said daughter, C. L., and my grandchild, C. G., and her issue (if any) *then* be my next of kin; such persons, if more than one, to take in equal shares as tenants in common." When the particular event happened on which the trust came into operation there were living the testator's daughter and grandchild and a sister of the testator and two nephews, sons of a deceased brother. It was held by Brett M.R., as he then was, and Bagge and Fry L.JJ., reversing Kay J, and following *Wharton v. Barker* (2), that the effect of the words "shall *then* be my next of kin" was to create an artificial class—namely, those who would have been his next of kin under the Statute of Distributions had he died at the time indicated by the word *then*. In *Sturge and Great Western Railway Co.* (3) the testator, who had several children, after declaring several trusts in favour of each of them and their respective issue, directed that in the event of any one of his children dying without issue and without having exercised the power of appointment by the will conferred upon each child, *then* as to the property held in trust for that child and the rent and annual profits thereof from the time of such decease it should be held in trust "for the person or persons who at the time of such respective decease of my children shall by virtue of the Statutes for the Distribution of the Estates of persons dying intestate be my next of kin, and if more than one, then in the shares, proportions, and manner prescribed by the said statutes." The testator died in 1844, leaving seven children and no issue of any deceased child. Frances Sturge, one of his daughters, died a spinster in May, 1871, without having executed the power of appointment given to her. Mary Harwood, another daughter, died in the lifetime of her sister, Frances, leaving

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
—
Lord Atkinson.
—

(1) (1885) 52 L. T. 839.

(2) 4 K. & J. 483.

(3) 19 Ch. D. 444, 449.

H. L. (E.) 1920 seven children, who were alive at the death of this aunt of theirs. The testator's next of kin at his own death were his seven children, but the persons who would have been entitled under the Statutes of Distribution at or immediately after the death of his daughter Frances, if he had then died, were his five surviving children and the seven children of Mary Harwood. It was urged in argument, as it was urged on behalf of the respondents in the present case, that the case was governed by the decisions in *Bullock v. Downes* (1) and *Mortimer v. Slater* (2), and that those only could take "by virtue of the statute" who were next of kin of the testator at the time of his death. But Hall V.-C. said that upon the construction of the testator's will he, the Vice-Chancellor, could come to no other conclusion than that the testator had created an artificial class, and that he intended, and in effect said, "at each of the several periods, you shall ascertain the class, and then the members of it are to take in certain modes, but the modes in which they are to take must be regulated by the Statutes of Distribution as nearly as the existing circumstances of the case will admit—the class being different from that which would have comprised the persons to take if it had been directed by me to be taken at a different period—viz., at my death." The Vice-Chancellor's criticism of the decisions in *Bullock v. Downes* (1) and *Mortimer v. Slater* (2) is important and instructive. He said: "With regard to the authorities which have been referred to" (naming them), "and more particularly with regard to Lord Justice James's judgment in *Mortimer v. Slater* (2), I have to observe that the decisions depended upon the particular expressions used with respect to 'such persons as will then be entitled.' That is what Lord Justice James laid hold of at once in the latter case; and he asked in effect, 'How do you show that you are entitled under the description?' In order to satisfy the description you must be a person who can show a title under the statute, and the only persons who can do that are the next of kin of the testator at his death; and he rested the case upon no other ground than that." The

(1) 9 H. L. C. 1.

(2) 7 Ch. D. 322.

Vice-Chancellor in the same case then refers to the remarks of Baggallay L.J. in reference to the judgment of Lord Hatherley, when Vice-Chancellor, in *Wharton v. Barker* (1), and quotes the passage from Baggallay L.J.'s judgment running as follows: "The Vice-Chancellor then went into the consideration of the particular words which he found in that case, and was of opinion that they did clearly and distinctly point to another period as the period at which the class was to be ascertained." Hall V.-C. then proceeds: "It appears to me that the corresponding words here, 'who at the time of such respective decease of my children shall,' etc., import that the class was to be ascertained at that time. It seems to me to follow as a matter of course that we have got an artificial class, artificial in the sense that you must suppose that the testator was looking to a class who would be ascertained at the time he designated and at no other time; and that although we find in this case a reference to the 'shares, proportions, and manner prescribed by the Statutes,' yet those words must give way for the purpose of ascertaining the class at another point of time than that of the death of the testator, at which the statute would ascertain them."

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
Lord Atkinson.

The case of *Mortimer v. Slater* (2) which came to the House of Lords, under the title of *Mortimore v. Mortimore* (3), was decided two years and a half before *Sturge and Great Western Railway Co.* (4) was ruled upon by Hall V.-C. Nothing was then said in your Lordships' House to dispose of the Vice-Chancellor's criticism. There was no creation of an artificial class at all in *Mortimore v. Mortimore*. (3) The words to be construed ran simply: "or if there be no such children that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the Statute for the Distribution of Intestates' Estates," but here the word "then" does not appear to me to be an adverb of time at all, but is equivalent to "in that event."

(1) 4 K. & J. 483.

(2) 7 Ch. D. 322.

(3) 4 App. Cas. 448.

(4) 19 Ch. D. 444.

H. L. (E.) My Lords, it would appear to me that almost every word
 1920 of this lucid and convincing judgment of Hall V.-C. applies
 HUTCHINSON to the present case.

v.
 NATIONAL
 REFUGES
 FOR
 HOMELESS
 AND
 DESTITUTE
 CHILDREN.
 Lord Atkinson.

In the present case a time has been fixed by the testator for the ascertainment of the artificial class—namely the time when the trust declared fails. That is not the time at which the natural class, if I may so describe it, would be ascertained by the Statute of Distribution, but the words “be entitled to my personal estate under the Statute of Distribution” cannot have the effect of substituting the statutory date for the ascertainment of the class for the period the testator has clearly fixed for the ascertainment of it. The words “entitled under the Statute of Distribution” must, to use Hall V.-C.’s language, give way for the purpose of ascertaining the class at a point of time other than the death of the testator. The point of time being thus fixed in the present class, the artificial class must satisfy another condition. Members are not to be the next of kin of the testator at common law, but must be such persons as would be entitled under the Statute of Distribution, if the testator had died, not at the time of his actual death, but at the special time fixed for the ascertainment of the artificial class.

In *In re Mellish* (1) a testator who died in 1880 gave by his will 12,000*l.* upon trust to invest it and pay the income to G. M. for life, and after his decease to pay the income to E. M., his wife, for life, and after the decease of the survivor of them upon trust for the person or persons who at the decease of the survivor should be of the blood of G. M. and of kin to him, and who would under the Statutes of Distribution of Intestates’ Effects be entitled to his personal estate as if he were dead unmarried and intestate. It was held by Neville J. that the gift was to an artificial class consisting of the next of kin of G. M. to be ascertained as if he had died on the day of the death of E. M.

That learned judge, after pointing out that the rule in *Bullock v. Downes* (2) was expressly stated to be *prima facie*, and did not preclude the Court from giving effect to what

(1) [1916] 1 Ch. 562.

(2) 9 H. L. C. 1.

it found to be the intention of the testator expressed by the words of his will, says that he is unable to distinguish the case he was deciding from *Sturge and Great Western Railway Co.*(1), the decision of which is based upon *Wharton v. Barker.* (2)

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
Lord Atkinson.

The decision of Lord Parker, then Mr. Justice Parker, in *In re Wilson* (3) does not appear to me to be in conflict with this line of authorities extending from the year 1858 to the year 1916, but quite distinguishable from them. The clause in the will upon which the decision turned ran thus : " I direct that the trust fund and the income thereof and all statutory accumulations of income (if any), or so much thereof respectively as shall not have been applied under any of the powers hereinbefore contained or referred to, shall be in trust for such person or persons as on the death of my said nephew Samuel Eyres Wilson will be entitled to (sic) as my next of kin under the Statute for the Distribution of Intestates' Estates."

Lord Parker, in giving judgment, distinguishes the case under consideration from the case of *Sturge and Great Western Railway Co.*(1) He said that if the words in that case had been the same as in the case before him, he thought Hall V.-C. would have decided differently, and wound up his judgment by saying : " I have come to the conclusion, having regard to the use of the express words ' will be entitled as my next of kin under the statute ' that no one will be entitled who cannot say, ' I am or represent a person who at the death of Samuel Eyres Wilson was entitled as one of the next of kin of the testator by virtue of the Statutes.' " On appeal this case was treated as governed by *Bullock v. Downes* (4), and it was said that even if the words " at the death of my nephew " were treated as equivalent to *then*, they only referred to the time when persons entitled would come into possession.

The words of the will in that case are wholly different from

(1) 19 Ch. D. 444.

[1907] 2 Ch. 572.

(2) 4 K. & J. 483.

(4) 9 H. L. C. 1.

(3) [1907] 1 Ch. 450, 464; *affd.*

H. L. (E.) those in the present case. They are not, it would appear
1920 to me, directed to create an artificial class at all.

HUTCHINSON On the whole, therefore, I am of opinion that the appeal
v. should succeed, that the decision appealed from was erro-
NATIONAL neous and should be reversed, and that the declaration
REFUGES should be made.
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.

LORD MOULTON. My Lords, the testator in this case died leaving a widow and three daughters. The earlier dispositions in the will are not material for the purposes of the present case, which relates solely to the residue which after the death of the wife is left in trust in certain proportions to his daughters and their issue for life with cross limitations. The ultimate effect of these provisions is to prevent the failure of these trusts until all three daughters have died without issue. This is the event which has in fact happened, and the question raised in this litigation is the interpretation of the clause in the will which defines the ultimate gift over in that case.

The clause reads as follows :—

“ I do further direct that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the Statutes for the Distribution of the Personal Estate of Intestates such persons if more than one to take distributively according to the said statutes.”

The question we have to decide is what did the testator mean by this direction ? That which first strikes one upon reading these words is the repetition of the phrase “ on failure of such trusts.” These words may have one of two meanings. They may define the event which is to call into operation the gift over, or they may refer simply to the time when that gift over shall take effect. It cannot be doubted that where the phrase first occurs it is used to define the event on the happening of which the gift over shall come into force. But I am clearly of opinion that where it subsequently appears it refers simply to the moment of time when that event

occurs. To give it the other interpretation would not only render it mere surplusage but would leave no rational explanation of its insertion. It may therefore be fully and correctly replaced by the word "then," seeing that by reason of the earlier words of the clause the word "then" will mean "on failure of such trusts."

In the events that have happened the clause will therefore read as follows :—

"Such residue shall be in trust for such person or persons as then shall be my next of kin and entitled to my personal estate under the Statutes for the Distribution of the Personal Estate of Intestates such persons if more than one to take distributively according to the said statutes."

The earlier words of this description appear to me to fix the intention of the testator with regard to the class who are to benefit by the gift. It is to be the persons who would be his next of kin at the date in question, or, in other words, those who have been entitled to his personal estate had he died intestate at the date in question. I can see no other possible interpretation of the words which are in themselves plain and simple, and thus interpreted they define the class of beneficiaries clearly and without ambiguity.

The difficulty arises from the words that follow—i.e., "and entitled to my personal estate under the Statutes," etc. The judgment of the late Master of the Rolls would have us regard these words as setting forth a second qualification which persons must possess in order to entitle them to be included in the class which is to benefit by the gift over. He considers that the beneficiaries must not only be such next of kin, but must also have been entitled to the testator's personal estate as next of kin at the date of his death. Such an interpretation creates a hopeless contradiction between the two parts of the clause. To be one of the "then" next of kin the person must be alive at the date when the clause comes into force, and that cannot occur until all the next of kin at the date of the testator's death have died leaving no issue, so that none of those entitled at his death can be

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
Lord Moulton.

H. L. (E.) among the "then" next of kin. This latter part of the clause
 1920 therefore cannot have been inserted for the purpose of defining
 HUTCHINSON the class of beneficiaries (which has been already fully defined)
 v. but must have some other object.

NATIONAL
 REFUGES
 FOR
 HOMELESS
 AND
 DESTITUTE
 CHILDREN.
 Lord Moulton.

The object of the later words of the clause appears to me to be evident when one reflects that the clause would not have adequately expressed the testator's intentions if it had only defined the class of persons who were to benefit under the gift. It is necessary that it should also define the shares which the individuals forming that class should take, and the language of the last words of the clause shows beyond controversy that they, at least, refer to the mode of distribution among the members of that class. Looking at it from this point of view the meaning of the whole becomes plain in spite of the awkwardness of the language. To ascertain the class you are to find out who are the testator's "then" next of kin. For that purpose you must imagine a demise of the testator intestate at the date of the failure of the earlier trusts, and the first part of the clause we are construing says that the persons who would share his personal estate upon such hypothetical demise shall be the persons who are to share in the residue. The object of the latter part of the clause is to say that such hypothetical demise shall also determine the shares which they shall individually take—i.e., they shall take as they would be entitled to do under the Statutes of Distribution in such a case. The effect of the whole clause is therefore that the funds shall be distributed precisely as though the testator had died intestate at the date when the gift over is to take effect. Thus interpreted the provision for the distribution of the fund is intelligible and one which the testator might reasonably be expected to make.

No doubt the clause is clumsily framed but not so clumsily as to defeat what I am clear was the intention of the testator. Both "next of kin" and "entitled" are used in relation to the same hypothetical demise, and not in the strict legal sense which would require them to relate to a real demise. I do not think that this is in any way a strained

interpretation. If the clause be read as a whole it seems to me to be not difficult to perceive that the word "entitled" relates to the position of the individuals as next of kin, and means that they are to claim as such next of kin would be able to claim in the distribution of an estate. Perhaps it would have been clearer if the word "and" had been omitted before "entitled," but without that alteration it is to my mind sufficiently clear that the aim of the whole of the clause is that the distribution is to be the same in all respects as though the hypothetical demise had been an actual demise.

Interpreted as above this is not a case which in any way clashes with the decisions in such cases as *Bullock v. Downes* (1); *Mortimore v. Mortimore* (2); and *In re Wilson* (3), to which we were referred in the arguments of counsel. In all of these cases the class is defined by their being "next of kin" to the testator. In a case of that kind there is no ambiguity and the words must be given their strict legal meaning. But in this case it is not so defined. It consists of those who would be next of kin in case of a hypothetical demise, and who therefore in the eye of the law are not next of kin to the testator. The definition of the class is, in my opinion, so clear that the fact that the testator has spoken of them as being entitled "under the Statutes of Distribution" cannot confuse it, and we are driven to accept the further description as being one in which the word "entitled" is not used in relation to the rights which would follow upon the actual demise of the testator but to those that would follow from the hypothetical demise which is the foundation of his definition of the class of those who are to share in the funds.

I am therefore of opinion that this appeal should be allowed, and that it should be declared that the persons who would be the next of kin of the testator, had he died at the date of the failure of the earlier trusts, are entitled to share in the gift over in the proportions and in the manner that they

H. L. (E.)
1920
HUTCHINSON
v.
NATIONAL
REFUGES
FOR
HOMELESS
AND
DESTITUTE
CHILDREN.
—
Lord Moulton.
—

(1) 9 H. L. C. 1.

(2) 4 App. Cas. 448.

(3) [1907] 1 Ch. 450; [1907] 2 Ch.
572.

H. L. (E.) would have been entitled to share had the testator actually
 1920 died at such date.

HUTCHINSON
 v.
 NATIONAL
 REFUGES
 FOR
 HOMELESS
 AND
 DESTITUTE
 CHILDREN.
 Lord Moulton.

Order of the Court of Appeal reversed : Declared that upon the true construction of the will of William Hutchinson, the next of kin, therein designated to take the residue of his personal estate on the failure of the trust thereby declared by his will in favour of his daughters and their children, must, in the events that have happened, be ascertained as at the date of the death of his surviving daughter Sarah Hutchinson. The costs of all parties in the Courts below and also the costs of the appeal to this House, to be taxed as between solicitor and client and paid out of the estate.

Lords' Journals, May 4, 1920.

Solicitors for the appellant: *Rose, Johnson & Hicks.*

Solicitors for the respondents, the National Refuges for Homeless and Destitute Children: *Hawes, Wood & Ware.*

Solicitors for the respondents, the trustees of the will of the testator: *Farrar, Porter & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*

DUKE OF NORTHUMBERLAND . . . APPELLANT ;

1920

April 30.

AND

COMMISSIONERS OF INLAND REVENUE . RESPONDENTS

Revenue—Excess Mineral Rights Duty—Method of Computation—Pre-war Rent Value—Deduction of Income Tax—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89) s. 43, sub-s. 1, 2.

By the Finance (No. 2) Act 1915, s. 43, sub-s. 1, "Where the amount payable to any person as rent in respect of the right to work minerals . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty . . . an amount equal to fifty per cent. of that excess."

By sub-s. 2 "The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer. . . .

"The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year":—

Held, that for the purpose of ascertaining the amount upon which excess mineral rights duty was to be paid under this section the rate of income tax to be deducted, as well from the hypothetical royalties based on pre-war prices as from the royalties payable in respect of the accounting year, was the rate current in the accounting year.

Decision of the Court of Appeal [1919] 2 K. B. 200 affirmed.

APPEAL from a decision of the Court of Appeal (1) reversing in part an order of Sankey J. (2)

The question to be determined was whether, upon the true construction of s. 43 of the Finance (No. 2) Act, 1915, which imposes Excess Mineral Rights Duty, in ascertaining "the pre-war rent value" income tax should be deducted at the rate prevailing in the accounting year or at the average rate of the tax in the two selected pre-war years.

* *Present*: VISCOUNT CAVE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD WRENBURY and LORD PHILLIMORE.

(1) [1919] 2 K. B. 200.

(2) [1918] 2 K. B. 573.

H. L. (E.)
 1920
 DUKE
 OF
 NORTHUM-
 BERLAND
 v.
 INLAND
 REVENUE
 COM-
 MISSIONERS.

The facts are fully stated in the report of the case before the Court of Appeal, but the following summary may be useful.

The appeal related to an assessment made by the respondents on the late Duke of Northumberland for the year ending September, 1916, for excess mineral rights duty in respect of certain coal and fireclay from mines leased by him to the Throckley Coal Co. The assessment showed that the amount payable to the late Duke in the accounting year as rent varying according to price for the right to work the minerals under the lease was, without any deduction for income tax, 9718*l.* odd, and that the pre-war rent value of the same tonnage, based on the average price governing the payment of rent in the selected pre-war year, was, without any such deduction, 6990*l.* From each of these figures income tax was deducted at the rate of 4*s.* in the *l.*—the rate prevailing for the accounting year—with the result that the actual rent for the accounting year was reduced to 7774*l.* odd and the pre-war rent value to 5592*l.* odd. After such deduction the excess of the first figure over the second—namely, 2182*l.*—was taken as the amount on which excess mineral rights duty was to be assessed.

The late Duke appealed to a referee appointed under the Finance (1909–10) Act, 1910, upon the ground that the assessment was excessive, in respect that in estimating the pre-war standard of rent a deduction for income tax was made at the rate current for the accounting year, whereas it should have been made at the rate current for the selected pre-war year—namely, 1*s.* 2*d.* The referee acceded to this contention, and his determination was affirmed by Sankey J.

The Court of Appeal (Swinfen Eady M.R., Warrington and Scrutton L.JJ.) reversed the decision of Sankey J. on this point, and restored the assessment of the respondents.

1920. April 29. *Sir John Simon K.C.* and *Micklethwait* (with them *Disturnal K.C.*) for the appellant.

This House has decided that the words “in that year” at the end of sub-s. 2 of s. 43 of the Finance (No. 2) Act,

1915, refer to each of the three years immediately preceding the first accounting year: *Murray v. Inland Revenue Commissioners*. (1) Rent, so far as it varies with the price of the minerals, here means net receipts per ton, and the amount on which excess mineral rights duty is to be assessed is to be arrived at by a comparison of the net rent per ton which the landlord actually received in the accounting year with the net rent per ton which he is taken by the Act to have received in the selected pre-war years. To ascertain the net rent for the accounting year income tax must be deducted at the rate current in that year and to ascertain the net rent according to the pre-war standard income tax must be deducted at the average rate current in the selected pre-war years. In no other way can effect be given to the intention of the Legislature, which was to tax profits due to the rise in price of minerals during the war. Excess mineral rights duty is a form of excess profits duty and is leviable on rent actually received—i.e., on the balance of rent after deducting income tax. *Duke of Beaufort v. Inland Revenue Commissioners*; *Inland Revenue Commissioners v. Marquess of Anglesey*. (2) [They also referred to *Inland Revenue Commissioners v. Earl of Lonsdale's Trustees*. (3)]

H. L. (E.)
1920
DUKE
OF
NORTHUMB-
LAND
v.
INLAND
REVENUE
COM-
MISSIONERS.

Sir Gordon Hewart A.-G. and Sheldon for the respondents.

Here one is always dealing with the accounting year; every factor is constant except the price. The sum will never be worked out in accordance with sub-s. 2 if a different rate of income tax is taken for the pre-war period. The notional rent is still the notional rent for the accounting year. This is not like the excess profits tax. The problem here is not to make a contrast between one actual yield and another, but to contrast two results in the accounting year—one the actual profits and the other profits that would have been produced on the output of that year at pre-war prices. The possible hardship of this mode of taxation has been dealt with by a subsequent statute. If it had been meant to make an allowance for a variance of income tax that would have

(1) [1918] A. C. 541.

(2) [1913] 3 K. B. 48.

(3) [1917] 2 K. B. 760; [1919]
2 K. B. 183.

H. L. (E.) 1920
 {
 DUKE
 OF
 NORTHUM-
 BERLAND
 v
 INLAND
 REVENUE
 COM-
 MISSIONERS.

been provided for. To accept the appellant's contention would be to disturb the manifest scheme and intention of the Legislature. The Legislature is dealing with one year alone—namely, the accounting year—and the questions to be determined are what is the rent in fact? and what would it have been on the output for that year at pre-war prices?

Micklethwait replied.

At the conclusion of the arguments:—

VISCOUNT CAVE intimated that their Lordships would give judgment on the following day.

April 30. VISCOUNT CAVE: My Lords, this appeal arises from a difference as to the amount upon which excess mineral rights duty is payable by the appellant under s. 43 of the Finance (No. 2) Act, 1915.

That section provides, omitting certain words which have no application to the present case, as follows: “(1.) Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty an amount equal to fifty per cent. of that excess. (2.) The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the tax-payer. . . . The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year.” The words “in that year” at the end of sub-s. 2 refer, as was pointed out in *Murray v. Inland Revenue Commissioners* (1), not to the accounting year, but to each

of the three years immediately preceding the first accounting year; and the effect of the section (stated shortly) is that duty is to be paid upon the difference between the amount actually received for royalties in respect of the accounting year and the amount which would have been so received in respect of that year if the output had remained the same and the selling prices had been equal to the average prices in the selected pre-war years. In other words, duty is to be paid upon so much of the royalties for the accounting year as is due to a rise in prices since the commencement of the war. In saying this I leave out of account the proviso to sub-s. 21 of the Finance Act, 1917, which has no application to the present case.

The late Duke of Northumberland, the predecessor in title of the appellant, was the owner of certain mines and seams of coal in the Blucher and Throckley areas in the county of Northumberland, and had demised them to the Throckley Coal Company, Limited, at royalties which varied according to the selling price of the coal. Early in the year 1917 the Commissioners of Inland Revenue served upon the Duke a notice of assessment to excess mineral rights duty in respect of the rent or royalties received from those mines for the accounting year ending in September, 1916, such notice being accompanied by a statement which showed that in arriving at the sum assessed the Commissioners had deducted, both from the rent received in respect of the accounting year and from the pre-war standard of rent as ascertained for the purposes of the section, income tax at the rate current in the accounting year, that is to say, at the rate of four shillings in the pound. The Duke appealed against the assessment to a Referee appointed under the Finance (1909-10) Act, 1910, on the ground that in ascertaining the pre-war standard of rent income tax should have been deducted, not at the rate current in the accounting year, but at the rate current in the average pre-war year; and the Referee, after argument, so decided. A petition of appeal having been presented to the High Court, the decision of the Referee was affirmed by Sankey J., but on the case being taken to the Court of

H. L. (E.)
1920
DUKE
OF
NORTHUM-
BERLAND
v
INLAND
REVENUE
COM-
MISSIONERS.
—
Viscount Cave.

H. L. (E.)
 1920
 —
 DUKE
 OF
 NORTHUM-
 BERLAND
 v.
 INLAND
 REVENUE
 COM-
 MISSIONERS.
 —
 Viscount Cave.

Appeal that Court took a different view, and on April 9, 1919, made an order as follows: "The Court doth determine that income tax is to be deducted before arriving at the amount of excess liable to excess mineral rights duty under s. 43, sub-s. 1, of the Finance (No. 2) Act, 1915, and that in arriving at the pre-war rent values under sub-s. 2 the rate of income tax to be deducted is the rate current for the accounting year, and doth order that the original assessment made by the petitioners be restored." Against that order the present appeal was brought.

In the course of the arguments before Sankey J. and the Court of Appeal, it was contended on behalf of the Commissioners that on the true construction of s. 43 no deduction whatever should have been made for income tax, and that the comparison to be made under the section is between the gross amount received for royalties in respect of the accounting year and the gross amount which would have been so received upon the hypothesis prescribed by the section. This contention was rejected both by Sankey J. and by the Court of Appeal, their decision being based partly upon the frame of the lease in this particular case, and partly upon a previous decision of the Court of Appeal relating to mineral rights duty: *Inland Revenue Commissioners v. Marquess of Anglesey*.⁽¹⁾ Against this part of the decision of the Court of Appeal no appeal has been lodged by the Commissioners, who were content to have their assessment confirmed; and your Lordships are therefore not called upon to express any opinion upon that part of the case. This being so, I assume for the purposes of this appeal that it is proper to deduct income tax from both the sums brought into comparison for the purposes of the section, and that the only question is at what rate tax should be deducted.

My Lords, upon this point I cannot entertain any doubt. Sect. 43 directs that for the purpose of ascertaining the excess royalties assessable to duty, a comparison shall be made between two sums, that is to say, first, the amount of the royalties payable in respect of the accounting year,

(1) [1913] 3 K. B. 48.

and secondly, the sum to which the royalties for the same accounting year would amount if the royalties for that year were based on the average prices of the selected pre-war years, and that if the former sum exceeds the latter duty is to be paid on the difference. In this calculation nothing is to turn on the profits which were, or on any hypothesis would have been, made in any of the pre-war years. Each factor in the comparison is to be based upon the actual output of the accounting year; and, although the second factor is to be ascertained on the hypothesis that the average pre-war prices remain unaltered, the result is treated as the hypothetical rent for the accounting and not for the pre-war year. It follows that in both branches of the comparison you are still in the accounting year. The tax paid on the first factor in the calculation—the actual royalties for the accounting year—must of course be at the rate current in that year; and the tax treated as paid on the second factor—the hypothetical royalties for the same accounting year—must in my opinion be at the same rate. The result is that the tax to be deducted on both sides must be that of the accounting year and no other.

For these reasons, my Lords, I am of opinion that the decision of the Court of Appeal is right, and accordingly that this appeal fails and should be dismissed with costs.

LORD ATKINSON : My Lords, I concur.

LORD SHAW OF DUNFERMLINE : My Lords, I agree with the opinion expressed in the Court below by Scrutton L.J. I am not concerned, my Lords, with the precedent which so naturally exercised that learned judge's mind. With regard to that precedent, I will only respectfully adopt his language at the bottom of page 75 of the Appendix as follows : "I should have thought that the whole amount of the rent was payable to the landlord and was paid to the landlord, but was paid by discharging a matter which otherwise might have been obtained from the landlord if he had been assessed directly. But," he goes on, "while that is the view I might

H. L. (E.)
1920
DUKE
OF
NORTHUM-
BERLAND
V.
INLAND
REVENUE
COM-
MISSIONERS.
—
Viscount Cave.

H. L. (E.)
1920
DUKE
OF
NORTHUM-
BERLAND
v.
INLAND
REVENUE
COM-
MISSIONERS.
Lord Shaw
of
Dunfermline.

have taken if the matter had been free from authority it appears to me that the decision in the case of the *Duke of Beaufort v. Inland Revenue Commissioners* (1) binds me and prevents me from taking that view." This House is of course not bound by that authority, and as to it I desire expressly to say that I give no opinion as to whether it was or was not correctly decided. I make this reservation, because the case upon it pro and contra has not been fully argued at your Lordships' Bar; and further in my view that precedent does not truly bear upon the issue—a quite different issue—which is now before your Lordships' House.

The issue now before us substantially refers, as your Lordship on the Woolsack has just said, to the construction of certain words occurring towards the close of sub-s. 2 of s. 43 of the Finance Act of 1915. My Lords, your Lordship has read those words and I do not do so again, but my view of the situation created by those words is simply this. We are not concerned, and are expressly told by the statute not to be concerned, with the amount of gross rent or with the amount of net rent, with the amount of rent receivable or received, payable or paid. We are expressly directed in administering the statute to adopt a notional rent which is fixed upon a certain basis.

Now that notional rent, my Lords, is by no means remote from ordinary figures or experience; it has nothing unnatural or unreasonable about it; and the best way to test it is to apply it to one ton. If the output of the pit were one ton, what the statute directs is that you should take that one ton of output and compare the royalties—post-war royalties—upon it with the royalties which were paid upon one ton in the pre-war year. Having thus obtained the surplus, or excess, of the later as against the earlier you have a certain number of shillings and pence, and that figure for one ton is the excess profit under the statute. The statute then proceeds directly to inform you that the way to work the notional rent is simply to multiply that excess profit on the one ton by the output of the pit in the accounting

(1) [1913] 3 K. B. 48.

year. Having performed that simple act of multiplication you obtain the notional excess profit which is the subject of the duty.

My Lords, in that way all difficulty and trouble disappear. You take an arithmetic process conducted according to the directions contained in the last words of s. 43 of the Act of 1915, and you thus obtain directly the excess which is the subject of the tax. Fifty per cent. of that accumulated difference then becomes the property of the Revenue under the statute of 1915.

H. L. (E.)
1920
DUKE
OF
NORTHUM-
BERLAND
v.
INLAND
REVENUE
COM-
MISSIONERS.
Lord Shaw
of
Dunfermline.

LORD WRENBURY: My Lords, the order under appeal in this case is one by which the Court of Appeal determined two matters. They determined first that income tax is to be deducted before arriving at the amount of excess liable to excess mineral rights duty under the Act. They determined secondly that in arriving at the pre-war rent values under sub-s. 2 the rate of income tax to be deducted is the rate current in the accounting year. In respect of the former of those there is no cross-appeal before your Lordships, and I think for good reason.

My Lords, I have had an opportunity since yesterday of looking into the decision of the Court of Appeal in *Lord Anglesey's Case* (1) to which I was a party. In my judgment, that decision was right. The key to the decision is found in an opening sentence in which it is pointed out that the property tax is by the statute not imposed upon the lessor; the statute makes it the debt of the lessee, and enacts that he may deduct it from the rent payable by him to the lessor if he deducts it at the time directed by the statute. In paying it therefore, the lessee is not making payment on behalf of the lessor; he is paying his own debt; and the statute provides that in respect of rent due under his lease he shall be discharged if, to take the figures in *Lord Anglesey's case*, he pays not the 150*l.*, which is the contractual rent, but the 141*l.* 5*s.* which is the differential sum.

With all respect to my noble and learned friend Lord Shaw

(1) [1913] 3 K. B. 48.

H. L. (E.)
 1920
 DUKE
 OF
 NORTHUM-
 BERLAND
 v.
 INLAND
 REVENUE
 COM-
 MISSIONERS.
 —
 Lord Wrenbury.

I must make a comment upon the passage in Scrutton's L.J.'s judgment which he has cited. That passage runs thus. The Lord Justice says: "If I approached the matter free from authority I should have thought that the whole amount of the rent was payable to the landlord and was paid to the landlord, but was paid by discharging a matter which otherwise might have been obtained from the landlord if he had been assessed directly." He never could have been assessed directly, and that was the express ground of the decision in Lord Anglesey's case. The Lord Justice's words are obviously to be understood as qualified by the words in the sentence immediately preceding—namely, "if the statute had been different." In fact the lessor could not have been assessed directly, and the lessee when he paid the property tax was not paying his lessor's debt—he was paying his own debt. The operation of the statute was that if he paid his own debt then the contractual debt was reduced by the amount which he was compellable to pay under the statute. In other words, the joint effect of the contract and the statute was that the rent payable and paid was not the rent reserved by the contract but the differential sum, being the difference between the rent reserved by the contract and the property tax which was the debt of the lessee.

My Lords, if it were necessary to pursue the matter further, there is another ground which arises upon the language of this particular lease and it is this. The obligation under the lease in para. 82 is that it is "agreed and declared that all and singular the rents hereinbefore reserved shall be paid free and clear of" a number of things which are mentioned, "and all other deductions whatsoever except the Landlord's Property Tax." The obligation therefore is to pay the balance of the contractual sums after deduction of the property tax. The contractual rent payable here therefore is not the whole calculated sum, but the differential sum, the difference between the amount arrived at by calculation of the royalties and the amount of the property tax.

My Lords, it is not necessary to pursue this matter further,

for the learned Attorney-General has said that if the income tax deduction is in each of the two calculations to be made at the rate prevalent in the accounting year he does not dispute that matter, and inasmuch as the House is of opinion that that proposition is true, the question does not arise. The main contention of the Attorney-General, which, in my opinion, is right, is this. He says that all the relevant facts of the accounting year are to be left undisturbed, except those which concern the calculation of the royalties as dependent upon prices. In my judgment this is right. One of those facts is that in the accounting year the rate of tax was so many shillings in the pound. That is to be left undisturbed. The tonnage of the accounting year is to be taken as the basis of two calculations, the one made upon the footing of such royalties as emerge from the fact that in the accounting year prices were such as they were in fact in that year, and the other made upon the footing of such royalties as would emerge if the prices had been such as they were in the average of the selected years. The differential sum is that upon which the duty is to be calculated. This is the effect of the Order on that appeal. I think that is right and that this appeal should be dismissed.

H. L. (E.)
1920
DUKE
OF
NORTHUM-
BERLAND
v.
INLAND
REVENUE
COM-
MISSIONERS.
Lord Wrenbury.

LORD PHILLIMORE : My Lords, I concur with the observations and conclusions of the noble Viscount upon the Woolsack. I have one observation to add. The apparent difficulty in this case was created by the decision of the Court of Appeal in the cases of the Duke of Beaufort and the Marquess of Anglesey. I agree with the submission on behalf of the Commissioners that those cases do not affect the decision at which the House should now arrive. At the moment I see no reason why the decision in the cases referred to should not be correct, but then no argument has been offered to the contrary ; so I reserve my opinion. Supposing that decision to be sound, it is nevertheless the case that the Legislature has directed that for the purpose of determining excess mineral rights duty the comparison between two years shall be upon rates so far as variable according to

H. L. (E.) price, and not so far as variable according to two factors,
1920 price and income tax. Supposing the decision to be incorrect
DUKE the argument is then a fortiori. It is suggested that in this
OF event the assessment made by the Commissioners is illogical ;
NORTHUM- but, as the Attorney-General has pointed out, this is not
BERLAND so ; the assessment has been made according to the usual
v practice so as not to subject the tax-payer to double
INLAND taxation.
REVENUE
COM-
MISSIONERS.

Lord Phillimore.

*Order of the Court of Appeal, in part complained
of in this appeal, affirmed and appeal
dismissed with costs.*

Lords' Journals, April 30, 1920.

Solicitors for the appellant: *May, How & Chilver.*

Solicitor for the respondents: *H. Bertram Cox, Solicitor
of Inland Revenue.*

H. L. (Sc.)

[HOUSE OF LORDS.]

1920

May 6.

KEMP APPELLANT ;
AND
CORPORATION OF CITY OF GLASGOW RESPONDENTS.

*Local Government—Burgh Accounts—Common Good—Misapplication—Ultra
vires—Municipal Elections—Payment of Electioneering Expenses in
adjoining Constituencies.*

An elector of the Royal burgh of Glasgow by a petition in the Sheriff's Court under s. 14 of the Glasgow Corporation Act, 1909, impeached the legality of an item in the accounts of the common good referred to as fees for professional services under the heading "Parliamentary Expenses—Session 1912—Glasgow Boundaries Act, 1912." The item related to a Bill (which became the Act of 1912) promoted by the corporation for the enlargement of the burgh by the inclusion therein of certain adjoining police burghs. The petitioner averred by his condescendence that certain payments comprised in this item were illegal in respect that they included payments in respect of election expenses

* *Present:* VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN and LORD MOULTON.

of annexationist candidates for membership in the municipal councils in the burghs sought to be annexed :—

Held (by Viscount Finlay, Viscount Cave and Lord Moulton ; Viscount Haldane and Lord Dunedin dissenting as to the extent of the remedy), that the averments were relevant and that a proof should be allowed, inasmuch as such payments were against public policy as tending to interfere, in the interest of the corporation, with the municipal elections in the adjoining burghs.

Held, by Viscount Haldane and Lord Dunedin, that the right of the petitioner was limited to proof before answer, so that the question of relevancy might be finally determined when the circumstances relating to the payments complained of were before the Court.

Decision of the First Division of the Court of Session in Scotland 1919 S. C. 71 reversed.

H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPORATION.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland which affirmed an interlocutor of the Sheriff-Principal of Lanarkshire, recalling an interlocutor of the Sheriff-Substitute. (1)

The appellant, who was an elector of the City and Royal Burgh of Glasgow, objected to an item of 666*l.* 14*s.* 10*d.* for professional services under the heading "Parliamentary Expenses—Session 1912—Glasgow Boundaries Act, 1912," contained in the Common Good Accounts of the respondents, the Corporation of the City of Glasgow, for the year 1912–13, and by a petition presented to the Sheriff under s. 14 of the Glasgow Corporation Act, 1909, craved the Court to sustain his objection and to disallow this item.

In 1912 the respondents promoted a Bill to extend the boundaries of the city by incorporating therewith the police burghs of Govan, Partick, and Pollokshaws and sundry suburban areas adjoining the city, and this scheme was approved by Parliament and was passed as the Glasgow Boundaries Act, 1912. The item objected to by the appellant related to the expenses incurred by the corporation in connection with the promotion of this Bill.

The appellant averred (condescendence 4) that payments of 115*l.* and of 795*l.* 9*s.* 5*d.* were made to Mr. Robert Kyle, writer, Glasgow, and Mr. David Crawford, writer, Glasgow, respectively which were not properly vouched in the said accounts and that there were numerous other items in the

(1) 1919 S. C. 71.

H. L. (Sc.) said payment of 6666*l.* 14*s.* 10*d.* in the same position ; that
1920 the vouchers for the said payments were admittedly false
KEMP in respect that they were not only for professional services
v. rendered, but included outlays for 507*l.* and 250*l.* expended by
GLASGOW KYLE and Crawford without any details being rendered in
CORPOR- connection therewith, and (condescendence 5) that the
ATION. vouchers for the payments above referred to did not contain,
as they should do, details of the accounts for which the
payments were made.

By condescendence 6 the appellant averred that the respondents were bound to produce to the Court details of the services rendered by the law agents referred to and also of the two sums of 507*l.* and 250*l.* of alleged outlays. It was further averred that the law agents did as a matter of fact render to the town clerk detailed accounts both of their services and of their outlays ; that these accounts were not submitted to the committee in charge of the parliamentary Bill, nor were they submitted to and passed by the corporation. It was also averred that these detailed accounts disclosed illegal payments, in consequence of which some of them were returned to the law agents and a simple receipt "for professional services" was taken in lieu of a discharge of the accounts.

"Condescendence 8. It is averred that said payments are illegal, in respect that they contain, inter alia, payments in respect of election expenses of annexationist candidates for membership in the municipal councils in the burghs of Govan, Partick and Pollokshaws, and in various portions of the counties sought to be annexed. A number of these payments were made and expenses incurred through alleged ratepayers' committees in Govan, Partick and other districts annexed, said committees having been formed by the said Robert Kyle and David Crawford, as agents for the defenders and acting solely for them."

The respondents pleaded, inter alia (1.), that the averments of the appellant, so far as material, being irrelevant and insufficient to support the crave of the petition, the action should be dismissed.

The Sheriff-Substitute repelled this plea and allowed a proof, but his interlocutor was recalled by the Sheriff-Principal, who sustained the plea and dismissed the action, and the interlocutor of the Sheriff-Principal was affirmed by the First Division of the Court of Session (the Lord President (Lord Strathclyde), Lord Mackenzie, Lord Skerrington and Lord Cullen).

H. L. (Sc.)
1920
KEMP
v.
GLASGOW
CORPOR-
ATION.

March 16, 18, 1920. *Macmorran K.C.* (with him *Jas. B. Paton* (of the Scottish Bar)) for the appellant. There is no real distinction between what is alleged in condescendence 8 and the payment of a bribe. It cannot be lawful to spend the common good for the purpose of influencing public opinion in the manner alleged. It is not contended that all expenses incurred by the corporation on propaganda work in connection with the promotion of the scheme for enlarging the boundaries of the burgh are necessarily bad, but the payment of the election expenses of candidates pledged to support annexation stands upon a different footing and is a misapplication of the funds of the common good. This case falls within the principle laid down by Lord Shaw of Dunfermline in this House and by Fletcher Moulton L.J. in the Court of Appeal in the *Osborne Case*. (1) The item in the burgh accounts for professional services under the heading "Parliamentary Expenses, Session 1912, Glasgow Boundaries Act, 1912," is one which ought to have further light thrown upon it, and in the circumstances the appellant is justified in calling for the details included in that item: Glasgow Corporation Act, 1909, ss. 5, 13, 14. Upon this point the appellant relies upon the reasoning of Lord Salvesen in his dissentient judgment in *Eadie v. Glasgow Corporation* (2), which relates to the same item.

Clyde L.A. (with him *Macquisten K.C.* and *Thos. A. Gentles* (both of the Scottish Bar)) for the respondents. In considering the relevancy of an allegation that some part of the expenditure included in the item complained of was incurred in the assist-

(1) [1910] A. C. 87, 111; [1909] 1 Ch. 163, 186, 187.

(2) 1916 S. C. 163, 175-178.

H. L. (Sc.) 1920
 KEMP
 v.
 GLASGOW
 CORPOR-
 ATION.

ance of local candidates' election expenses it must be remembered that this is a question about the accounts of the common good, which is held by the corporation as its own in the same way as private property, subject only to the condition that it must be spent for some purpose for the common benefit. From the time of their creation the Royal burghs in Scotland have possessed property, designated by the name of the common good, which was held by the provost and magistrates for the benefit of the inhabitants. The magistrates, however, were left the judges of the public benefit, and originally not only was the administration of the common good incapable of criticism by any individual burgess but no provision was made for any audit: see per Lord Dunedin in *Dundee Harbour Trustees v. Nicol*. (1) It was in these circumstances that the Royal Burghs (Scotland) Act, 1822, was passed. That Act provided that a particular account of the common good should be made up annually and that such account should be open to the inspection of the burgesses, who might call for the production of any particular vouchers. The effect of that was that the risk was run of incurring a great deal of expense by having the account audited by a crowd of amateurs. But the Act gave no power to control the expenditure and in no way qualified or restricted the discretion of the corporation in dealing with the common good. That Act was superseded to some extent by the Royal Burghs (Scotland) Act, 1833, but this matter of the audit was left as it was. At length by the Town Councils (Scotland) Act, 1900, provision was made for a public audit of the accounts, but Glasgow continued to be regulated by the Acts of 1822 and 1833 until 1909, and is now regulated by the Glasgow Corporation Act, 1909, which also provides for a public audit. The consequence of that is to sweep away the rights of the private burgesses under the earlier Acts and to substitute for these rights the provisions of ss. 13 and 14, under which the right to call for vouchers is not given. Therefore the question is now, What under ss. 13 and 14 has the elector a right to demand? Under those sections he is entitled to a fully stated account in all

(1) [1915] A. C. 550, 563-568.

reasonable detail, and he is entitled to complain of any particular item, but he is not entitled to the production of vouchers. It is impossible to tell from any account, however exact, the precise details of the services included in the account in order to test their legality or otherwise. This case is governed by *Eadie v. Glasgow Corporation*. (1) The only question now is whether there is a relevant statement of dissatisfaction with a particular item. It is submitted that the averments in arts. 6 and 8 of the condescendence raise no relevant objection to the two payments complained of. The corporation for the purpose of promoting their annexation scheme did everything which a promoter of a parliamentary Bill always does, and, it is submitted, legitimately does.

It is not illegal for a private person to pay a candidate's election expenses. It is not as if the corporation had said: "I will pay your expenses if you promise to vote in a particular way." That is not alleged. There being then nothing which is illegal per se in this expenditure, is it illegal in the sense that this is not a payment that a corporation can lawfully make out of the common good? That can only be because it is not for the benefit of the inhabitants. That, however, cannot be maintained. The true test is, Is this an expenditure for the general benefit of the community at large? Unless the transaction amounts to a bargain of the kind that Lord Shaw condemns in *Osborne's Case* there is no illegality in it. The object was to facilitate the promotion of a measure which is for the interest of the community at large, and for such an object public opinion may be influenced and encouraged in any legitimate way. A great deal of expenditure which will influence public opinion and public elections is legitimate. The corporation has the widest discretion over the common good and the Court will refuse to interfere with the exercise of that discretion unless it is so inconsistent with the benefit of the community that the Court can say: "That is not within your power": *Nicol v. Magistrates of Aberdeen*. (2) As a matter of political taste it might have been better if the corporation had refrained from all interference with

H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPORATION.
—

(1) 1916 S. C. 163.

(2) (1870) 9 M. 306, 308.

H. L. (Se.) public opinion outside the limits of the burgh, but no
 1920 distinction can be drawn between paying election expenses
 KEMP and paying money for other methods of influencing public
 v. opinion. The Court of Session was right in dismissing this
 GLASGOW CORPORATION. action as irrelevant.

Macmorran K.C. replied.

[The following cases were also referred to : *Ewing v. Glasgow Police Commissioners* (1); *Lang v. Glasgow Magistrates* (2); *M'Dowal v. Glasgow Magistrates* (3); *Eadie v. Glasgow Corporation* (No. 1) (4); *Attorney-General v. Wandsworth Board of Works*. (5)]

The House took time for consideration.

May 6. VISCOUNT HALDANE. My Lords, The Glasgow Corporation Act of 1909 directs the corporation to prepare yearly accounts of the revenue, expenditure and balances arising from their common good, as well as from rates and other assets. These accounts must show, among other things, all sums paid. They are to be audited, and any municipal elector is to be permitted to inspect and examine them, along with the auditor's confirmation or report. An elector who is dissatisfied with "any of the accounts or any item therein" may petition the Sheriff, specifying the grounds of objection, and the Sheriff is to hear and determine the matter of complaint, and his decision may be the subject of appeal. In 1912 an Act was passed extending the boundaries of Glasgow. Sect. 80 provided that the costs, charges and expenses of and incident to the preparing for obtaining and passing the Act, or otherwise in relation thereto, were to be paid by the corporation. The accounts of revenue and expenditure, as presented under the statute, contained an item of 6666*l.* 14*s.* 10*d.* under the heading of "Parliamentary Expenses, Session 1912," and referred to as fees for professional services. The appellant, who is a municipal elector, made inquiry, and ascertained that the item contained, inter alia,

- (1) (1839) *Mac. & Rob.* 847;
 (1837) 15 *S.* 389.
 (2) (1748) *Mor. Dict.* 2515.

- (3) (1768) *Mor. Dict.* 2525.
 (4) 1908 *S. C.* 207, 217.
 (5) (1877) 6 *Ch. D.* 539, 542.

two payments of 1157*l.* and 795*l.* 9*s.* 5*d.*, made to two writers in Glasgow, Mr. Robert Kyle and Mr. David Crawford, respectively. He alleges that these sums were paid for services rendered in organizing a movement for securing support in areas outside Glasgow which were sought to be, and in the end were, brought within the enlarged area of the city proposed by the Bill, which afterwards became the Act of 1912. He alleges further that the money was, in part at least, spent in defraying the election expenses of candidates for membership of the councils of burghs outside Glasgow in the areas sought to be included, and that such expenditure was illegal. He presented a petition in the Sheriff Court of Glasgow craving that the item might be disallowed. The Sheriff-Substitute allowed a proof, but his interlocutor was recalled by the Sheriff-Principal, who decided that the averments so made were not relevant. This decision was affirmed by the First Division. It was there held that it was in the interest of the City of Glasgow to make such expenditure for the purpose of developing public opinion, and that it could therefore properly be made out of the common good which the corporation administers.

My Lords, it is quite true that by the law regulating the title of a Royal burgh in Scotland to the common good the town council has a wide discretion in making payments out of it so long as these are made for the benefit of the burgh. But this latitude of course does not enable payments to be made for purposes that are not legal. Expenditure made by the corporation of Glasgow with the direct object of influencing a candidate for the representation on the council of a burgh outside Glasgow to stand, and to vote, if returned, for incorporation, may well be illegal as being contrary to public policy. If the purpose really is that he should act in the interest, not of the burgh which he is seeking to represent in its council, but in that of the corporation of Glasgow which is promoting a Bill for the incorporation of his constituency within the area of Glasgow, and is desirous of producing evidence of public opinion in the areas sought to be incorporated favourable to their incorporation, I am not

H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPOR-
ATION.Viscount
Haldane.

H. L. (Sc.) prepared to accept, without further consideration, the view that money may lawfully be spent out of the common good of the City of Glasgow for such a purpose. Nor do I think that the fact that money so spent has been included in the taxed account of the expenses of and incident to the obtaining and passing of the Act subsequently obtained, an Act which contains a section directing payment of such expenses by the corporation, precludes the point of legality from being subsequently raised. But, before an opinion can adequately be pronounced as to whether the particular expenditure actually made is of a description that is thus objectionable, it is, I think, necessary to know in some detail the character and purposes of that expenditure, how it was made, and its items. Until this information is before the Court it cannot satisfactorily decide a question of public policy which turns on matters of fact and of ethics rather than of abstract law.

My Lords, in the pleadings in the case before us there seem to me to be averments which make it right that the Court should call on the corporation of Glasgow to produce the fuller details to which I have referred. When, but not before, these are produced it will be possible to pronounce whether the expenditure was of an objectionable character. I do not think that the pursuer has at the present stage in the proceedings a higher right than this, but in my view he has this right now. My impression is accordingly that the most suitable way of dealing with the action is to remit it to the Court of Session with a declaration limited to this result, and to direct that there should be a proof before answer. This form of procedure will keep the final question of relevancy intact until it becomes capable of being properly dealt with.

VISCOUNT FINLAY. My Lords, this action was brought in the Sheriff Court of Lanarkshire by John Kemp, as an elector of the City of Glasgow, against the corporation, and the claim is that some of the items appearing in the accounts of the corporation as "Parliamentary Expenses, Session 1912," under the special heading "Glasgow Boundaries Act 1912," being "Fees for professional services" should be

disallowed. The application of the pursuer is based on the Glasgow Corporation Act, 1909, and especially upon s. 14 thereof. Condescendence 4 and condescendence 6 challenge as illegal certain items in the account, more particularly two outlays of 507*l.* and 250*l.* Condescendence 8 alleges that the said payments are illegal in respect that they contained, inter alia, payments in respect of election expenses of annexationist candidates for membership of the municipal councils in Govan, Partick and Pollokshaws, and in various portions of the counties sought to be annexed. Condescendence 9 asks that the pursuer's objection to the accounts should be sustained and that the accounts should be rectified accordingly. The defenders' fourth and fifth pleas in law were as follows: "4. The defenders having been authorised by Section 80 of the Glasgow Boundaries Act, 1912, to pay all costs, charges, and expenses of and incident to the preparation for obtaining and passing of that Act or otherwise in relation thereto, and the expenditure being all incident to the preparing for, obtaining, and passing of said Act or otherwise in relation thereto is a legal and valid payment out of the said common good. 5. The expenditure complained of being neither illegal nor ultra vires on the part of the defenders, and they having, in the exercise of their discretion, authorised said expenditure to be paid out of the Common Good, their discretion is not subject to review, and the action should therefore be dismissed." The Sheriff-Substitute allowed proof, but his decision was reversed by the Sheriff-Principal, whose opinion was sustained on appeal by the First Division of the Court of Session. Your Lordships are now asked to restore the Order of the Sheriff-Substitute.

On August 7, 1912, there was passed an Act for extending the boundaries of the City of Glasgow, and the items which are now challenged appear in the accounts of the corporation with reference to the expenditure incurred in connection with the Bill. The 80th section of the Act (2 & 3 Geo. 5, c. xcv.) provides as follows: "The costs, charges, and expenses of and incident to the preparing for obtaining and passing of this Act, or otherwise in relation thereto, shall be paid

H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPOR-
ATION.

Viscount Finlay.

H. L. (Sc.) by the corporation, and if paid out of borrowed money shall
 1920 be repaid out of revenue within five years from the passing
 KEMP of this Act." It is alleged that for the purposes of promoting
 v. the passage of the Bill the corporation employed funds
 GLASGOW forming part of the common good in promoting the election
 CORPOR- in the adjoining burghs and districts proposed to be annexed,
 ATION. of candidates who were in favour of the policy of annexation.
 Viscount Finlay. The short question in the case is whether the allegations in
 condescendence 8 are relevant and should, as such, be admitted
 to probation as the Sheriff-Substitute held. In other words,
 could the corporation properly apply the common good of
 Glasgow in the payment of the election expenses of candidates
 in the adjoining constituencies which it was proposed by the
 Bill to incorporate with Glasgow? It was urged on behalf
 of the corporation that the common good is the property
 of the corporation and may be lawfully applied for any purpose
 which is for the advantage of the city. The annexation
 of the adjoining constituencies it was said was for the
 advantage of Glasgow as well as for the advantage of these
 other constituencies, and it was urged that the common good
 of Glasgow might properly be applied in securing the return
 to the municipal bodies in these adjoining constituencies of
 members in favour of the extension of the boundaries, as the
 prospects of the passing of the Bill would be improved if
 candidates holding such views were returned.

There is no doubt that the corporation have a very wide
 discretion as to the application of the common good. Lord
 Dunedin, during the argument in your Lordships' House,
 referred to a Scottish statute with reference to the common
 good passed in the reign of James IV. in the year 1491. This
 statute appears in vol. ii. of the Acts of the Parliament of
 Scotland, Thomson's edition, p. 227, and the material portion
 of it is quoted in Balfour's Practicks at p. 45 under the heading
 "Burrow lawis." It is as follows: "ITEM, It is statute
 and ordanit, anent the commoun gude of our soverane Lordis
 burrowis within the realme, that the said commoun gude
 be observit and keipit to the commoun proffit of the town,
 and to be spendit in commoun and necessare thingis of the

burgh, be the avise and counsall of the town for the time, and dekinis of craftis quhair they ar; and inquisitioun zeirlic to be tane in the chalmerlane air, of expensis and dispositioun of the samin. Ja. IV., fol. 93, act. 59. 18 Maij, 1491." In the case of *Nicol v. Magistrates of Aberdeen* (1) a proposed application of the funds of the common good was challenged in an action of suspension and interdict. Lord President Inglis is reported as having said as follows: "It is in the jurisdiction of this Court to interfere and control the proceedings of a municipal council upon sufficient ground—upon the ground either that there is plain excess of power on the part of the council, or upon the ground that what they are proceeding to do is plainly against the interests of the community which they represent; but where there is no excess of legal power it certainly requires a very strong case to induce the Court to interfere with the discretion which the law vests in the municipal council in the first instance." It was said in *McDowal v. Magistrates of Glasgow* (2): "It is true that magistrates who act for the town, are in the common case of tutors, curators or other administrators: They are trustees only; and if they betray their trust, they are subjected to the controul of a Court of Law; and to that controul they cheerfully submit."

H. L. (Sc.)
1920
KEMP
v.
GLASGOW
CORPOR-
ATION.
—
Viscount Finlay:
—

It is, however, clear from such cases as the *Aberdeen Case*, to which I have just referred, that the Courts will be very slow to interfere with their discretion in the application of the common good. If the application proposed be illegal, it is, of course, another matter.

If the payment in question in this case is illegal it must be on the ground that it is against public policy. It is to be noted that the pursuer does not aver on record that the candidates to whom such assistance was given were required in any way to pledge themselves to the support of annexation when the matter came up in the councils for which they were standing. It is consistent with the allegations made by the pursuer that the candidates who were helped in this way were left perfectly free as to their municipal action. The

(1) 9 M. 306, 308.

(2) Mor. Dict. 2525.

H. L. (Sc.) question is neatly raised whether a corporation may lawfully spend money from the common good on the expenses of electioneering in adjoining constituencies. This question has never arisen for decision on any previous occasion. We have been referred to the *Osborne Case*. (1) In that case the question was as to the application of the funds of trade unions in securing the return of members of Parliament. In the Court of Appeal Moulton and Farwell L.JJ. pronounced it illegal on the ground that a pledge was exacted from the candidates who were supported fettering the freedom of their parliamentary action. This is the ground on which Lord Shaw rested his decision in the House of Lords against such application of the funds of the union. But so far as the record here is concerned, it is silent as to any such pledge being required from the candidates whose return for adjoining constituencies was promoted by the corporation of Glasgow. The observations made in the *Osborne Case* (1) are, however, very important as illustrating the application of the doctrine of illegality on ground of public policy to the conduct of elections, and what is there said seems on principle just as applicable to municipal as it is to parliamentary elections. In *Neville's Case* (2) an agreement was held unenforceable on grounds of public policy, as it was in effect a contract that a newspaper should be conducted in a manner not consistent with the proper conduct of a newspaper in the public interests. This is another illustration of the application of the principle of public policy, but it has no direct bearing upon the particular case which now arises. The same observation may be made with regard to *Montefiore v. Menday Co.* (3) before Shearman J., but some of the observations made by the learned judge in deciding that case are worthy of attention. After citing Lord Eldon in *Norman v. Cole* (4) and Coltman J. in *Hopkins v. Prescott* (5) Shearman J. says with reference to the question whether an agreement is against public policy: "It is well settled that

(1) (C. A.) [1909] 1 Ch. 163; (3) [1918] 2 K. B. 241, 245.
 (H. L.) [1910] A. C. 87. (4) (1800) 3 Esp. 253.
 (2) [1915] 3 K. B. 556. (5) (1847) 4 C. B. 5 8, 596.

in judging this question one has to look at the tendency of the acts contemplated by the contract to see whether they tend to be injurious to the public interest." He went on to say that it had been urged upon him that a judge should act with great caution in declaring a contract void as against public policy, and cited various dicta to this effect, but said, adopting the language of Pollock C.B. in *Egerton v. Earl Brownlow* (1): "I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise."

H. L. (Sc.)
1920
KEMP
v.
GLASGOW
CORPOR-
ATION,
Viscount Finlay.

The case that has now come before us is new and, in some respects, remarkable. It appears to me that it is certainly against public policy that a corporation like that of Glasgow should be at liberty to devote its resources to promote the return in adjoining constituencies of candidates who would be prepared to support a particular policy which, at the time, in the view of Glasgow, is desirable. Such expenditure certainly has a tendency to influence the representation of the adjoining constituencies which ought, as far as possible, simply to reflect the opinion of those constituencies themselves. It is obvious that such expenditure would have to be kept secret at the time of the election at which the subsidized candidate was standing. If the fact were known it would tend seriously to impair his chances of success, as it is, I think, obvious that any constituency would look with great disfavour upon any candidate who had accepted assistance which might tend to affect his opinion upon the question of the pending Bill. That the transaction has necessarily to be kept secret goes some way, in my opinion, to show that there is something wrong in such an arrangement.

During the argument the Lord Advocate, who appeared for the respondents, was asked whether it would be competent to apply the common good in paying the election expenses of candidates for the municipal council of Glasgow itself who were in favour of some particular line of policy which commended itself to the magistrates. I understood the Lord

H. L. (Sc.) Advocate to say that he would not consider such expenditure proper, but that such expenditure in Glasgow itself would not stand on the same footing as expenditure in an adjoining constituency. I agree that such expenditure in Glasgow would be unlawful, but I cannot see any valid distinction for this purpose between such expenditure on municipal elections in Glasgow itself and similar expenditure on elections in adjoining constituencies. The common good is not held to be applied for electioneering purposes either in the city itself or in other municipalities, and I do not see how such expenditure can be brought within the terms of the statute of James IV., however liberally it may be construed. In my opinion any such expenditure in adjoining constituencies is against public policy as tending to interfere with the local elections in the interest of the corporation of Glasgow, and therefore illegal. The Sheriff-Substitute, in sending the case to proof, said: "I think the pursuer's contention is right, and that if he can substantiate his averments he has just ground for complaint and may have the account rectified." It may be that the allegations are unfounded or that facts may be established on the trial which would put a different colour upon the transaction, but condescence 8 appears to me to state a good ground of action, and the pursuer should not be deprived of the opportunity of showing that it is true in fact.

For these reasons I think that the appeal should be allowed with costs of the appeals here and below, and that the interlocutor of the Sheriff-Substitute should be restored.

VISCOUNT CAVE. My Lords, the appellant, an elector in the City of Glasgow, being dissatisfied with an item of expenditure of 666*l.* 14*s.* 10*d.* contained in the Common Good Account for the city for the year ending May 31, 1913, complained against this item by a petition to the Sheriff of Lanarkshire in accordance with s. 14 of the Glasgow Corporation Act, 1909. The item in question purported to be a payment of "fees for professional services" in connection with the Bill for the Glasgow Boundaries Act, 1912, by which the boroughs of

Govan, Partick and Pollokshaws were annexed to the City of Glasgow; and the main objection to the item was stated in the condescendence for the pursuer (the appellant) as follows: "Cond. 8. It is averred that said payments are illegal, in respect that they contain, inter alia, payments in respect of election expenses of annexationist candidates for membership in the municipal councils in the burghs of Govan, Partick and Pollokshaws and in various portions of the counties sought to be annexed. A number of these payments were made and expenses incurred through alleged Ratepayers' Committees in Govan, Partick and other districts annexed, said Committees having been formed by the said Robert Kyle and David Crawford as agents for the defenders and acting solely for them." The condescendence also contained averments to the effect that the law agents to whom these payments were made rendered detailed accounts of their services and outlays, but that these detailed accounts disclosed illegal payments in consequence of which some of them were returned to the law agents and a simple receipt "for professional services" taken in lieu of a discharge of the accounts.

The defenders, the corporation of Glasgow, raised certain pleas in law, of which the first was as follows: "The averments of the pursuer, so far as material, being irrelevant and insufficient to support the crave of the petition, the action should be dismissed."

The Sheriff-Substitute repelled this plea and allowed a proof, but his interlocutor was recalled by the Sheriff, who sustained the first plea in law for the defenders and dismissed the action. The decision of the Sheriff was confirmed by the First Division of the Court of Session, and the pursuer has appealed to this House.

The opinions of the Sheriff and of the learned judges of the First Division proceeded upon the ground that payments out of the common good for the purpose described in condescendence 8 are legal and proper. I cannot think that this view is correct. The allegation comes to this: that at a time when the corporation of Glasgow was seeking to

H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPOR-
ATION.

Viscount Cave.

H. L. (Sc.) 1920
 KEMP
 v.
 GLASGOW
 CORPOR-
 ATION.
 —
 Viscount Cave.

annex the neighbouring districts, the corporation paid out of the common good the expenses of candidates for membership in the municipal councils of those districts who were in favour of the annexation. Such a payment must surely be against public policy. It is no doubt true that, generally speaking, a candidate for municipal honours is entitled to accept payment of his election expenses either from personal friends or from those who support his policy ; but where a competition of interests has arisen or is likely to arise between the municipality which he seeks to serve and some other person or body, he should be free from any pecuniary influence on the part of the latter. I assume for the purposes of this decision that in the present case the candidates in question were genuinely convinced that the annexation of their districts to Glasgow was desirable on public grounds, and that they gave no pledge to the corporation or its agents as to their future action if elected. But the question raised must be determined with reference to the tendency of the course pursued and not to its actual result ; and it is impossible not to see that the existence of a pecuniary nexus must tend to influence the judgment and action of a candidate. It appears to me that the practice adopted in this case, if generally followed, would tend to interfere with the rights of electors and with the independence of members of municipal authorities, and that the case falls within the category of cases described by Lord Shaw in *Amalgamated Railway Servants v. Osborne* (1) as contrary to public policy. There appears to be no other authority directly bearing on the point ; but reference may be made to *Neville v. Dominion of Canada Co.* (2), and *Montefiore v. Munday Motor Components Co.* (3), and to the American case of *Marshall v. Baltimore, &c. Ry. Co.* (4), quoted in Pollock on Contracts, 8th ed., p. 340. If the payments were wrong as being contrary to public policy, they are not validated by the general authority conferred upon the corporation by s. 80 of the Glasgow Boundaries Act, 1912, to pay the costs, charges, and expenses of and incident

(1) [1910] A. C. 87, 114.

(3) [1918] 2 K. B. 241.

(2) [1915] 3 K. B. 556.

(4) (1853) 16 Howard, 314.

to the preparing for, obtaining, and passing of the Act ; and, however wide may be the discretion of the corporation in the expenditure of the common good, it cannot extend to authorize payments which are illegal or against public policy.

For the above reasons I am of the opinion that this appeal should be allowed, and I would restore the interlocutor of the Sheriff-Substitute and allow to the parties a proof of their averments. The respondents should pay the costs of the appeals here and below.

H. L. (Sc.)
1920
KEMP
v.
GLASGOW
CORPOR-
ATION.
Viscount Cave.

LORD DUNEDIN. My Lords, I concur with the opinion of the noble and learned Viscount on the Woolsack. The judgment as it stands dismisses the petition by upholding the plea of irrelevancy. Condescendence 8 has been quoted and I need not quote it again. The view of the respondents really comes to this : that the moment you say that the candidates were annexationists then inasmuch as annexation was allowed by Act of Parliament and must be for the benefit of Glasgow, the payment of an annexationist candidate's expenses must be also for the benefit of Glasgow, and thus a proper subject on which to spend the common good. I cannot accede to that proposition. The powers of the magistrates over the common good are doubtless very extensive, but they are not entirely unfettered. My noble and learned friend Viscount Finlay has quoted the words of Balfour, which are a reproduction of the statute of James IV., 1491, c. 19. These ancient authorities show that the magistrates are not entirely unfettered, and indeed the counsel for the respondents admitted in argument that there must be something in the object of the expenditure connected with the good of the burgh to justify it. No doubt the discretionary powers of the magistrates are very wide, and as the law originally stood no one could call them to account except the Exchequer. I refer to the remarks as to the history of these matters which I made to your Lordships in the case of *Dundee Harbour Trustees v. Nicol* (1), but the title now rests on statute and is undisputed. While, on the one

(1) [1915] A. C. 550.

H. L. (Sc.)
 1920
 KEMP
 v.
 GLASGOW
 CORPOR-
 ATION.
 —
 Lord Dunedin.

hand, I cannot treat the averments in condescendence 8 as irrelevant on mere statement I do feel some difficulty, having regard to the wide discretion to which I have alluded, by simply affirming the relevancy and allowing a proof, in settling that ipso facto a payment of such expenses is an ultra vires act. I am inclined to think that such payments might be so, but for myself I think the safer course would be to send back the case with a direction that a proof should be allowed before answer. If that were done—and it is entirely in accordance with Scottish practice—we should see exactly what had taken place, and the Court below, guided by the observations which have fallen from your Lordships, would be able to decide on the matter without the door being absolutely shut if any payment for expenses of extraneous candidates were proved. I therefore somewhat regret the form which this judgment, in virtue of the view of the majority of your Lordships, will take.

LORD MOULTON. My Lords, the pursuer in this action is an elector in the City and Royal Burgh of Glasgow, and the defenders are the corporation of that city and Royal burgh and have control of the common good. As such, it is the statutory duty of the defenders to publish annual accounts of the expenditure of such common good and the pursuer, as an elector, is entitled under ss. 13 and 14 of the Glasgow Corporation Act, 1909, to inspect such accounts and, if dissatisfied with any of them or any item therein, to complain against the same by petition to the Sheriff specifying the grounds of objection. The Sheriff is empowered to hear and determine the matter of complaint and his decision is subject to the same right of appeal as in ordinary actions in the Sheriff's Court. The item as to which the pursuer is dissatisfied and in respect of which these proceedings are brought, is an item of 6666*l.* 14*s.* 10*d.* which appears in the published accounts of the defenders as "Fees for professional services" under the heading "Glasgow Boundaries Act, 1912." The account in which the above item appears relates to a Bill that was promoted by the defenders in the session

of 1912 which had for its object to extend the boundaries of the City of Glasgow by the inclusion therein of the police burghs of Govan, Partick and Pollokshaws and certain other suburban areas and for other purposes of like kind. The promotion was successful and resulted in the passing of the Glasgow Boundaries Act, 1912. By clause 80 of that Act it was provided as follows: "The costs, charges and expenses of and incident to the preparing for obtaining and passing of this Act or otherwise in relation thereto shall be paid by the Corporation." It is under this provision that the item of 6666*l.* 14*s.* 10*d.* appears as having been paid by the defenders as "fees for professional services."

H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPORATION.

Lord Moulton.

The pursuer avers that the said item includes payments which were wrongfully made by the defenders and therefore cannot be charged against or paid out of the common good, and he asks the Court to sustain his objection to the item and to ordain the defenders to rectify the common good accounts by excluding therefrom such items as are not adequately or properly vouched and such as are for illegal payments. As an example of items in the said item of 6666*l.* 14*s.* 10*d.* which are open to such objection, the pursuer in condescendence 4 cites the payment of 1157*l.* to Mr. Robert Kyle, writer, of Glasgow, and of 795*l.* 9*s.* 5*d.* to Mr. David Crawford, writer, of Glasgow. It appears from the matters alleged in condescendence 5 and not denied by the defenders that these sums include sums of 507*l.* and 250*l.* respectively in respect of outlays, but the defenders decline to give any further details either as to the services or as to the outlays in respect of which the payments were made. In condescendence 6 the pursuer avers that the defenders are bound to produce to the Court such details, and that they have received detailed accounts of them, and that such detailed accounts disclosed illegal payments. It is admitted that such detailed accounts were in fact rendered to the defenders but they deny that they showed any illegal payments. In condescendence 8 the real gist of the dispute appears. It reads as follows: "Cond. 8. It is averred that said payments are illegal in respect that they contain, inter alia, payments in respect

H. L. (Sc.) 1920
KEMP
v.
GLASGOW
CORPOR-
ATION.
Lord Moulton.

of election expenses of annexationist candidates for membership in the Municipal Councils in the Burghs of Govan, Partick, and Pollokshaws, and in various portions of the counties sought to be annexed. A number of these payments were made and expenses incurred through alleged Ratepayers' Committees in Govan, Partick and other districts annexed, said Committees having been formed by the said Robert Kyle and David Crawford, as agents for the defenders and acting solely for them." The pursuer's complaint came before the Sheriff-Substitute on March 8, 1917. He held that the averments were relevant and allowed a proof. On appeal to the Sheriff-Principal he reversed this decision, and held that the payment of the election expenses of annexationist candidates in the neighbouring burghs were expenses incurred "in preparing for obtaining and passing the Glasgow Boundaries Act, 1912, or otherwise in relation thereto" within the meaning of s. 80 of that Act, and that therefore the averments were irrelevant, and dismissed the action. An appeal was brought from the decision of the Sheriff to the First Division. They sustained the decision of the Sheriff and held that the averments were irrelevant, but I observe that they abstained from any reference to s. 80 of the Glasgow Boundaries Act, 1912, and base their decision solely on the powers of the defenders under the common law to make the alleged payments out of the common good. I am not surprised at their abstaining from basing their decision on s. 80 of the Act. Wide as are the words of that clause with regard to the expenses which the corporation is authorized to pay, they are words of a type not uncommonly used in such Acts, and to my mind it is impossible to suppose that they include the payment of election expenses of candidates in other burghs chosen by reason of their being in favour of the annexationist policy of the defenders. It must be remembered that this is a question of interpretation of the language of a statute and has nothing to do with the special position of common good in Royal burghs in Scotland, and if we were to hold that such language covered the expenses of political agitation of the kind referred to, the decision would apply universally

both in England and Scotland, whether the corporation to which it referred were a Royal burgh or not. H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPOR-
ATION.

Lord Moulton.

Passing by this wholly untenable ground for a decision in the defenders' favour, the case reduces itself to the question whether the powers of the defenders by common law over the common good are sufficient to authorize them to apply its funds to such purposes as the payment of the election expenses of candidates favourable to the annexation scheme in the other burghs affected by it. I am fully conscious of the wide discretion that the corporations of Royal burghs in Scotland have over the uses to which the funds of the common good shall be applied, but the suggestion that they might rightly be applied to the purposes in question has seemed to me from the first to be so extraordinary that I waited with great interest to see what would be the test of the propriety or impropriety of a payment out of the common good, which would be put forward on behalf of his clients by the very able counsel who appeared for the defenders. His one and only test was whether an individual might do the same out of money belonging to him. If the payment would not be illegal in the case of an individual he maintained that the defenders might make it out of the common good. In other words, the corporation might deal with the common good as freely as an individual might deal with his own money if they believed that what they were doing was for the advantage of the city. It is clear to me that this cannot be the test. We must remember that, after all, the decisions of the corporation represent only the opinions of the majority of its members. I therefore put to him the case of a majority of the corporation being of one political party and sincerely believing that it was to the interest of Glasgow that the supremacy of that party in municipal politics should continue in the future. Would it be right for the corporation to subscribe largely out of the common good to the election funds of that party or to assist them in other ways, such as building for them convenient permanent premises as headquarters for their political work? He naturally shrank from maintaining that such action could be permissible. Yet a

H. L. (Sc.)

1920

KEMP

v.

GLASGOW

CORPOR-
ATION.

Lord Moulton.

private individual holding those opinions might legitimately apply his own money in this way with a sincere desire to benefit the city and with a belief that he was so doing. A still stronger case might be that of payments from the common good into a fund for defraying the election expenses of such candidates in the next municipal election as belonged to the party of the majority in the corporation. The judgment of the Court below lays down that such an act as paying for election expenses can lawfully be done by an individual with his own money, and if we accept the proposed test it follows that the corporation might lawfully do the same out of the common good. This appears to me sufficient to show that the proposed test cannot be the true one. The true test must be obtained from a consideration of the position of the corporation with regard to the funds of the common good. It is a civic body holding these funds impressed with the duty of using them for the benefit of the burgh. Both its own position and the nature of its duty bring limitations to the freedom of its use of the funds. It may not use them in a way unfitting a civic body nor apply them to purposes which are not rightly for the benefit of the burgh. Within these limitations it has no doubt very wide discretion.

The case of the defenders is that by interfering with the municipal elections in the neighbouring burghs, they will secure or tend to secure the election of representatives pledged to support the annexation scheme, or, in other words, to vote in favour of supporting the Glasgow Boundaries Bill when the question should come up before the municipal council of the burgh. It is not open to them to say that starting candidates with this object and paying their election expenses will not affect the municipal representation in these burghs, because their justification for spending the common good in this way is that it will have that effect, and thus benefit Glasgow. But it must be borne in mind that the candidates elected will govern the burghs in all municipal matters. They are not elected for a single vote upon the Bill. Can any one pretend that it is compatible with the position of a corporation that it should spend its funds in influencing

the choice by another burgh of those who are to manage its municipal affairs in its own interests? To my mind it is an utterly illegitimate use of its funds, and one wholly contrary to public policy. It must not be thought, however, that I should have considered such payments permissible even if the candidates elected had merely to vote on the question of the Bill. In some aspects this appears to me to be the worst feature of the case. Parliament attaches great importance in matters of this kind to the opinion of the burghs which it is sought to annex, and it rightly looks to the result of the municipal elections as indicating this opinion. That it should be permissible for the corporation of Glasgow to use the funds of its common good to affect the results of such an election, and to make those results different from what they would have been if the election had not been interfered with by it, is really to try to mislead Parliament as to the true and unbiased views of the inhabitants of the burgh. Indeed, it is very possible that the candidates whom the corporation of Glasgow had started and whose election expenses it had paid might be called by the corporation as witnesses for the Bill and presented to the committee dealing with the Bill as persons whose testimony ought to have greater weight attached to it by reason of their being the chosen representatives of the people of the burghs.

I am therefore of opinion that the averments in condescendence 8 are relevant and that payments of election expenses and otherwise in connection with the starting and running annexation candidates in the burghs that it was proposed to annex are not legitimate payments out of the common good of Glasgow, and that the interlocutors appealed against ought to be reversed, and that of the Sheriff-Substitute restored and that the respondents should pay the costs of the appeals here and below.

H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPOR-
ATION.

Lord Moulton.

*Interlocutors of the Sheriff of Lanarkshire and of
the First Division of the Court of Session
in Scotland reversed and Interlocutor of the
Sheriff-Substitute restored, and parties to be*

H. L. (Sc.)

1920

KEMP

v.

GLASGOW
CORPOR-
ATION.

allowed proof of their averments. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the appeals in the Sheriff Court and in the Court of Session, and also the costs of the appeal to this House.

Lords' Journals, May 6, 1920.

Agent for the appellant: *John Kennedy, W.S., for Bird, Son & Semple, writers, Glasgow, and Inglis, Orr & Bruce, W.S., Edinburgh.*

Agents for the respondents: *Martin & Co., for Sir John Lindsay, Town Clerk, Glasgow, and Campbell & Smith, S.S.C., Edinburgh.*

H. L. (Sc.)*

[HOUSE OF LORDS.]

1920

May 6.

BROWN AND OTHERS APPELLANTS ;

AND

GREGSON AND OTHERS RESPONDENTS.

Election—Trust Disposition comprising Foreign Land—Prohibition of Trusts by the lex situs—Beneficiaries entitled by Devolution of Law—Impossibility of surrender to Trusts of Will.

A testator by his trust disposition and settlement left the residue of his property in trust to be divided amongst his seven children, and directed that this provision was to be accepted in full of legitim, and that if any of the children should repudiate the settlement and claim their legal rights they were to forfeit all title to any share of his estate which he could dispose of by law. By a codicil the testator directed his trustees, instead of paying over to his daughter Mrs. G. her share of the residue, to hold it for her in liferent, and after her death to divide it among her children. Part of the testator's residuary estate consisted of land in the Argentine. By the law of that country no trusts were recognized in respect of land and accordingly on the death of the testator

* *Present* : VISCOUNT HALDANE, VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, and LORD MOULTON.

his children, including Mrs. G., succeeded automatically to the land in equal shares ab intestato. Mrs. G. claimed legitim and forfeited her interest under the will, but it was held in Scotland that her children could claim as independent legatees. Mrs. G.'s children claimed that the other six children of the testator should surrender to the trusts of the will the shares of land which passed to them under the Argentine law, as a condition of taking their share of the residue of the property of the testator in Scotland:—

H. L. (Sc.)

1920

BROWN

v.

GREGSON.

Held (by Viscount Haldane, Viscount Finlay, Lord Dunedin and Lord Moulton; Viscount Cave dissenting), that, as it was impossible for the testator's six children by any act of their own to render the land in the Argentine subject to the trusts of the will, they were not put to their election between their shares of the land in the Argentine and the benefits conferred upon them by the will.

Decision of the First Division of the Court of Session in Scotland 1919 S. C. 438 reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Hunter). (1)

The following statement of facts is taken from the opinion of Viscount Haldane. "By his trust disposition and settlement, James Brown, of Barlay, domiciled in Scotland, left the entirety of his property, of whatever nature and wheresoever situated, in trust, as regarded the residue, for his children and the issue of such as should have predeceased him. To his trustees he gave a power of sale, but there was no trust for conversion. He directed that the provisions for his children were to be accepted in full of legitim and any other rights which they might assert by reason of his decease, and that if any of them should repudiate the settlement thus made and claim their legal rights, or in any way prevent it from taking effect, they were to forfeit all title to any share of his estate which he could dispose of by law. He enabled his trustees to grant a power of attorney for managing and realizing his estate in South America. By a codicil he directed his trustees, instead of paying over her share to Mrs. Gregson, his daughter, to hold it for her in liferent, and after her death to divide it among her children who should then be alive, and the issue of any who had predeceased her, per stirpes. Besides his property in this country the testator owned land in the

H. L. (Sc.) Argentine Republic. The law of that country, which, of course, governs the disposition of immovables there, only permits a testator to dispose by will of one-fifth of his immovables in Argentina, the remaining four-fifths passing to his children as of right on his death. That law, in addition, does not permit trusts or contracts which restrict the free disposal of land by its owner. Nor can a testator appoint heirs to his heirs of such land, and the heir who becomes owner cannot bind himself not to dispose of the land.

“After the death of the testator proceedings were taken in the Courts of the Argentine Republic to ascertain whether his testamentary disposition of his immovable property was valid, and, on the intervention of the Attorney-General of the Republic, the trust disposition and settlement was declared to be null in so far as it purported to affect such immovables, as being contrary to the laws of the Republic regulating the transfer of heritable estate to and by the heirs to it. Mrs. Gregson has since claimed, not only her share under Argentine law in accordance with this declaration, but also a share by way of legitim in the movables under the law of Scotland. To these shares she is entitled, and she makes no claim at all under the trust disposition. The interest, however, of her children is one to which they have a title which is independent of hers. The appellants, who are five of the children of the testator, are claimants before the Court of Session in the action of multiple-pounding in which this appeal arises. The purpose of the action, which was brought by the trustees, is to ascertain the persons entitled to the trust estate, so far as it remains in their hands undistributed. The effect of the judgment of the Argentine Courts has been that the Argentine immovable property vested in seven children who survived the testator in equal shares.

“The Court of Session has already decided on a Special Case, the judgment in which is not questioned, that Mrs. Gregson’s children’s rights as fiars in a one-seventh share of the residue under the general disposition are not affected merely by their mother’s action. As the result the residue on which the trust disposition was capable of operating is divisible into seven

portions, to five of which the appellants are entitled ; to one of which a now deceased son had become entitled, and to another of which Mrs. Gregson's children are entitled. The question which remains is as to how the amounts of these seven shares ought to be ascertained. The respondents, who are Mrs. Gregson's children, contend that the appellants are put to their election between their claim under the distribution directed by the will and their claim to the Argentine immovables as taken by them independently of it. The appellants maintain that to apply the principle of election would be to do circuitously what the Argentine law forbids to be done at all by making the land to which it applies subject to a trust for the children of children, which is forbidden both as a gift of this nature and as an admissible qualification of the title of the children to the land, which must, by the Argentine law, be free from any restriction on the power to dispose of it. The Lord Ordinary decided that the appellants could not be put to their election in the fashion claimed. The First Division recalled his interlocutor to this effect, and held that the appellants, and the representatives of the deceased son, who, though not appearing in the proceedings, were in the same position as the appellants, could not claim a share in the fund in medio, consisting of assets the disposal of which was governed by Scottish law, without bringing the value of their shares in the Argentine immovables into account for the purpose of a division under the scheme contained in the trust disposition."

H. L. (Sc.)

1920

BROWN
v.
GREGSON.

1920. March 9, 11. *Alex. Moncrieff K.C.* and *Hon. William Watson K.C.* (with them *J.S. Leadbetter*) (all of the Scottish Bar) for the appellants. The appellants have become entitled to the Argentine land not by any action of their own but by the operation of the law of the Argentine Republic, and as to that land the will has been declared null and void. The appellants have not repudiated the trust disposition and settlement and accordingly have not forfeited the benefits thereby conferred upon them. They are not put to their election between the conventional provisions in their favour in the trust disposition

H. L. (Sc.) and settlement and the shares of the Argentine land falling to them as heirs of the truster, because they cannot surrender or convey the Argentine lands to the uses of the trust cum effectu. A nullity can neither be approbated nor reprobated. Nor can the appellants be called upon to make compensation to the trustees equivalent to the value of the Argentine land to which they have succeeded ab intestato, for the principle of compensation does not apply where the gift cannot be made effective. Compensation is limited to repudiation; it has no application to failure by operation of law. A man cannot be called upon to do something in supposed implement of the will of a testator unless what he is called upon to do will give effect to the will in specific form: *Douglas' Trustees v. Douglas* (1); *Clouston's Trustees v. Bulloch* (2); *In re Lord Chesham* (3); *Ker v. Wauchope* (4); *Hewit's Trustees v. Lawson*, (5) *Dundas v. Dundas* (6) is distinguishable because in that case there was no legal obstacle which prevented the heir from bringing the land into the settlement.

William Chree K.C. and *T. Graham Robertson* (both of the Scottish Bar) for the respondents. This will is not null and void in the sense that it cannot be looked at for the purpose of ascertaining the testator's intention, and a reference to the will shows that the directions of the testator contemplated and involved an immediate conversion. A sale being indispensable for the execution of these trusts, this power of sale must be construed as a power coupled with a trust: *Playfair's Trustees v. Playfair* (7); *Steel's Trustees v. Steedman*. (8)

[VISCOUNT HALDANE. The terms of this will and of the codicil are inconsistent with an immediate conversion.]

Then the question is, Is it shown on the evidence that there is an impossibility of giving effect to the substance of the testator's intention? The appellants are put to their election unless they can show a complete impossibility of making the

(1) (1862) 24 D. 1191.

(2) (1889) 16 R. 937.

(3) (1886) 31 Ch. D. 466.

(4) (1819) 1 Bligh, 1, 25.

(5) (1891) 18 R. 793.

(6) (1830) 4 W. & Sh. 460.

(7) (1894) 21 R. 836

(8) (1902) 5 F. 239.

Argentine lands or their proceeds available to the uses of the settlement. It is true that there cannot be a trust title to lands in the Argentine, but the appellants may vest the land in the trustees—not as trustees but as individuals—and the trustees may dispose of it according to the wishes of the testator. But two objections are taken to a title in that position. It is said, first, that the appellants might come to the Court in the Argentine and say that this was not a beneficial title, and that the Court would give effect to that demand. Be it so; that is something within the appellants' control. Then it is said that if the estate were put in the names of the trustees the trustees would have the absolute control of it and might sell it and apply the proceeds to their own purposes. But it would not be equity to defeat the plainly expressed intention of the testator merely because of this possible defect in the title of the trustees; and the design might be accomplished by a back letter. Alternatively the appellants might sell the land and remit the proceeds to the trustees in this country. There is here no such impossibility as existed in the cases of *Douglas* (1), *Hewit* (2), and *Chesham*. (3) It is an impossibility of machinery, not of substance. [They also cited *Cooper v. Cooper* (4); *Codrington v. Codrington* (5); *Douglas-Menzies v. Umphelby* (6); *Pitman v. Crum Ewing* (7); Bell's Commentaries, 7th ed., vol. i., p. 143; McLaren's Wills and Succession, 3rd ed., p. 254, § 471; *In re Ogilvie*. (8)]

Alex. Moncrieff K.C. in reply. There is a distinction between the real right to the land and the contract right in personam, and to substitute the one for the other is to make a new will for the testator.

The House took time for consideration.

May 6. VISCOUNT HALDANE (after stating the facts). My Lords, I think the question raised by this appeal is one of considerable nicety. Principles which at first sight seem to

H. L. (Sc.)
1920
BROWN
v.
GREGSON.

(1) (1862) 24 D. 1191.

(2) (1891) 18 R. 793.

(3) (1886) 31 Ch. D. 466.

(4) (1874) L. R. 7 H. L. 53.

(5) (1875) L. R. 7 H. L. 854, 861.

(6) [1908] A. C. 224.

(7) [1911] A. C. 217.

(8) [1918] 1 Ch. 492, 502.

H. L. (Sc.) conflict have to be interpreted and reconciled. In *Dundas v. Dundas* (1) this House decided what to-day is beyond question. A Scottish testator had executed a deed of settlement purporting to convey to trustees his whole property, including land in England. The deed was probative in Scotland, but as it was executed in 1818 before only two witnesses in place of three, as then required by the English law as to wills of land, it was therefore inoperative by English law. It was held that the heir to the land in England nevertheless could not hold it against the provisions of the settlement and at the same time claim a provision made for him in that settlement. The reason given was, not that the Scottish Courts could control the title of the heir, but that they could exclude him, unless he chose to bring his land in, from participation in the assets within their jurisdiction, on the ground that the heir was not entitled at once to approbate and to reprobate the terms of the testator's settlement. My Lords, as I have said, that was obviously within the competence of the Scottish Courts, at all events so far as insistence on compensation went. The heir was by the law of England free to deal as he pleased with the land in England, and he could, if he chose, accept the terms which the settlement sought to impose on him as the condition of participation in the other assets of which the testator had effectively disposed. But suppose that the law of England had done more than merely regulate the formalities of the kind of will that was required to deprive the heir of his title to succeed. Suppose that the English law had been to the effect that the heir should not use his land in such a fashion as to give effect to the purposes prescribed by the testator. This further question arose in *Hewit's Trustees v. Lawson*. (2) There, by a Scottish disposition, a testator had sought to make English realty available for charitable purposes, and his disposition was consequently pro tanto bad under the Mortmain Act, which, as it then stood, declared void every gift to charitable use of land or any estate or interest in it. The Court of Session held that the heir was not put to any election, because the Court must be satisfied, in order to put him to it,

(1) 4 W. & Sh. 460.

(2) 18 R. 793

that it was in his power, by waiving his objection to the will, or refusing to make a claim adverse to it, to perfect the right of those who would make title under the will. Where he was prohibited altogether from giving effect to the will by making over English land for charitable purposes he therefore could not be called on to make such a surrender of other assets as would indirectly bring about this result.

H. L. (Sc.)
1920
BROWN
v.
GREGSON.
Viscount
Haldane.

My Lords, the language of the then Mortmain Act was sweeping. It extended to every sort of interest arising out of English land. Every gift in a will which dealt with such an interest, in whatever country that gift was made, was struck at. The law applicable was the law governing the disposition of the land. It was not admissible, merely because the testator had shown that he intended it, by imposing the penalty of a forfeiture of other benefits, to allow him to make his heir give the land for a purpose which would have been contrary to the provisions of the Act. Such an intention was not to be within the power of the testator to enforce, unless indeed he had plainly gone so far as to make the surrender of the land by the heir a definite condition of the right to participate in his estate. The doctrine of election, which extends only to an obligation to compensate, did not go so far as this. It really turned on a different principle, which was, however, inapplicable when the heir was not left by the *lex loci* at liberty to treat the testator's direction as one which he was free to carry out. My Lords, I think that this is the underlying meaning of the decision in *Hewit's Trustees v. Lawson*. (1) The result turned on the character of the law of Mortmain, which did not merely require formalities for the validity of the devise, as with the general law relating to wills of English land which was considered in *Dundas v. Dundas* (2), but prohibited the gift by laying down a principle relating, not to evidence merely, but to substance, a principle invalidating altogether this class of gift. In the earlier case of *Douglas' Trustees v. Douglas* (3) the Court of Session had taken an analogous view in refusing to put to his election an heir

(1) 18 R. 793.

(2) 4 W. & Sh. 460.

(3) 24 D. 1191.

H. L. (Sc.)
 1920
 BROWN
 v.
 GREGGSON.
 Viscount
 Haldane.

of entail who, had he attempted to carry out an alteration directed by the testator in the destination under which he held, must have found himself precluded by law from doing so. The Court decided that in such a case the beneficiary was not put to his election, inasmuch as he could not make the election to do what was supposed to be demanded. My Lords, I think that the result there also is that such a demand by the testator was held not to be implied as an absolute condition. If he says in distinct language that the beneficiary is not to take at all if he cannot fulfil a condition, the fulfilment of which is impossible by law, such a condition may prevail, but it is not to be assumed as imposed in the absence of distinct language to that effect.

The doctrine of election rests on a different foundation. It is a principle which the Courts apply in the exercise of an equitable jurisdiction enabling them to secure a just distribution in substantial accordance with the general scheme of the instrument. It is not merely the language used to which the Court looks. A testator may, for instance, have obviously failed to realize that any question could arise. But the Court will none the less hold that a beneficiary who is given a share under the will in assets, the total amount of which depends on the inclusion of property belonging to the beneficiary himself which the testator has ineffectively sought to include, ought not to be allowed to have a share in the assets effectively disposed of, excepting on terms. He must co-operate to the extent requisite to provide the amount necessary for the division prescribed by the will, either by bringing in his own property, erroneously contemplated by the testator as forming part of the assets, or by submitting to a diminution of the share to which he is *prima facie* entitled, to an extent equivalent to the value of his own property if withheld by him from the common stock. As was said by Lord Cairns L.C. in *Cooper v. Cooper* (1) this condition arises not as on a "conjecture of a presumed intention, but . . . on a rule of equity founded on the highest principles of equity, and as to which the Court does not occupy itself in finding out whether the rule was

(1) L. R. 7 H. L. 53, 67.

present or was not present to the mind of the party making the will." Such a principle is different from that under which a condition of forfeiture arises, for there an intention clearly expressed by the testator is requisite. And it is, I think, because the principle has not to be based on such an expression of intention that the Court can mould its application. As Lord Eldon pointed out in *Ker v. Wauchope* (1) the limitation of the principle to compensation as distinguished from forfeiture is a subordinate principle which has been engrafted on the main one in order to make sure that what is ordered does not go beyond what substantial justice requires. My Lords, according to the authorities I have already discussed, the doctrine, being one the application of which the Court has a discretion to mould, ought not to be applied when the testator could not effectively impose the condition on the beneficiary otherwise than by imposing an absolute condition on taking at all which he has not expressed. On principle I think that this is right. Not only do the authorities referred to imply it, but it was in accordance with the doctrine as I have stated it that Chitty J. in *In re Lord Chesham* (2) decided that where a will purported to bequeath for the benefit of the testator's younger sons chattels which were settled in trust to go and remain as heirlooms with a house belonging to his eldest son, and then made the eldest son his residuary legatee, the latter was not to be put to his election. For it would have been a breach of trust for the trustees of the settlement to allow him to make over the chattels, and without their assent he was powerless to do it. His desire was to have the residue under the will, and he was allowed to do so without being compelled to elect to make compensation. The learned judge laid down that a Court of equity will not decree something to be done which would amount to a breach of trust, or be a mere idle act that could only lead to litigation. The reason why the eldest son could not make an assignment was because he had no assignable interest. "Election," said Chitty J., "means free choice." When he takes under the will there is nothing

H. L. (Sc.)

1920

BROWN

v.

GREGGSON.

Viscount
Haldane.

(1) 1 Bligh, 1.

(2) 31 Ch. D. 466, 476.

H. L. (Sc.) for him to give up, for there is nothing which he can give up.

1920
BROWN
v.
GREGSON.
Viscount
Haldane.

My Lords, I think that the authorities which I have cited confirm the view that the real ground on which an election to submit to a deduction by way of compensation is compelled is the equitable principle of administration with the restriction I have now referred to. If this be so, the question in the present case is simply whether the law governing the title to the testator's Argentine land permits the appellants to comply with the directions of the trust disposition. It seems to me clear that it does not. It is said that the appellants could sell their land or convey it to the trustees under the disposition. But they could not by doing so bring it effectively under the scheme of the instrument. If they were to try to do so the trustees would either not get the land itself, or would get it free from any binding trust. The law of the Republic strikes at such a transaction as the settlement directs, and does not allow the title to be made which the testator directed. It is plain that it is this law which must govern the validity, not only of the disposition but of the trusts sought to be engrafted on the title to the Argentine land, and of the directions to be carried out with regard to it. In this state of matters, to say that the appellants were bound to elect, or that they are reprobating the instrument by not doing what the law will not allow them to do, appears to me, both on principle and authority, to be wrong.

I think that we ought to reverse the judgment of the First Division, and to restore the interlocutor of the Lord Ordinary of September 3, 1918. The appellants should have their costs here and before the First Division.

VISCOUNT FINLAY. My Lords, this is an appeal from the decision of the Inner House reversing Lord Hunter's decision. The question is as to the application of the Law of Election or "approbate and reprobate," as it is termed in Scotland, and whether certain beneficiaries under the will are entitled to compensation out of the residue of the estate in respect of the loss of an interest given to them in land in the Argentine.

The Lord Ordinary held that the appellants were not bound to make such compensation while the Inner House held that they were.

H. L. (Sc.)

1920

BROWN

v.

GREGSON.

Viscount Finlay.

The testator, James Brown, had a large estate, real and personal. Part of it consisted of various parcels of land in the Argentine, valued at 110,000*l.*, and he had also some heritable property in Scotland and movable property in both countries, which made the estate of the total value of about 200,000*l.* By the trust disposition and settlement dated March 5, 1910, the testator appointed trustees to whom he left the whole of his property on certain trusts. The fourth of these trusts was in favour of his children who should survive him, equally, and it was declared that this provision was to be in full of legitim and all other legal rights, with a forfeiture clause as follows: "And if any of them shall repudiate this settlement and claim their legal rights, or shall in any way prevent this settlement taking effect, then such child or children shall forfeit all right to any share of that part of my estate, means, and effects, which I may dispose of by law, and they shall have right only to their respective legal provisions, and the share or shares of such child or children shall in that event accresce and belong equally to my other children or their issue." The trustees were given power to sell the trust estate or any part of it, and were authorized to grant a power of attorney with full powers for the management and realization of the estate in South America. The trustees were further authorized to hold the land in South America, and the settlement went on to provide: "But if they shall not have sold the same within six years after my death, I recommend them to sell as soon as conveniently may be thereafter, unless there be then an exceptional depression in its value. . . ." The proceeds of management and realization were to be from time to time transmitted to the trustees in Scotland.

The testator died on March 12, 1910, and was survived by seven children, one of whom was Mrs. Gregson. The fourth codicil to the will provided that Mrs. Gregson should have a liferent only in her share of the residue, which was to be held by the trustees and upon Mrs. Gregson's death equally divided

H. L. (Sc.) among her children then alive and the issue of any predeceased.
 1920 There are two such children, both minors, and they are
 BROWN respondents on this appeal. The other children of the testator
 v. were the appellants, and Oswald Stanley Brown, who was
 GREGSON. killed in action on December 22, 1915. Mrs. Gregson repudi-
 Viscount Finlay. ated the provisions of the will in her favour, and took her
 legitim. She thereby forfeited all rights under the will in
 her favour, and the income which she would have received by
 way of liferent became, during her lifetime, payable to the
 other members of the family. As was decided by the First
 Division on a Special Case, the forfeiture of her life interest
 did not affect the reversionary interest of her two children as
 fiars in one-seventh of the residue. The contest on the present
 appeal is between these two children of Mrs. Gregson as
 respondents and the appellants. Proceedings were taken in
 the Argentine to have it declared what was the effect of the
 trust disposition and settlement upon the land in the Argentine.
 In these proceedings it was decided, and the decision has not
 been questioned, that the testamentary dispositions in favour
 of the trustees of the will are invalid so far as land in the
 Argentine is concerned, as being contrary to the law of that
 country, which does not admit of trusts in land, and that the
 land vested in the seven children of the testator in equal shares
 absolutely by descent ab intestato. All the seven children,
 including Mrs. Gregson, thus took an absolute interest in the
 Argentine land, each share being one-seventh. The provision
 in favour of Mrs. Gregson's children failed, as no such rever-
 sionary trust interest is permitted by law in that country,
 and these children now claim that this should be made good
 to them by the appellants.

The present proceedings were taken by the trustees under
 the will as pursuers, in order to have the decision of the Scottish
 Courts as to the distribution of a balance of 647*l.* 4*s.* 11*d.*
 on the testator's estate other than the Argentine property.
 The condescendence annexed to summons set out the question
 as follows: "Owing to the foresaid decision of the Courts of
 the Argentine Republic regarding the said Argentine immov-
 able estate, and to Mrs. Gregson having claimed her legitim, a

further question has now arisen. The seventh defenders maintain that the final division of the trust estate should be made upon the footing that the first six defenders are entitled only to one-seventh each of the six shares of the Argentine immovable estate taken by them or their author as aforesaid, and that the value of the remaining seventh of the said six shares should be taken into account in computing the amount of the share of the trust estate to be held for Mrs. Gregson's children. The first six defenders maintain that the Argentine immovable estate should not be taken into account in the distribution of the residue of the trustor's estate. The present action has accordingly been rendered necessary." All the members of the family were made parties, and the condescendence put in on behalf of the present appellants states their case thus: "These claimants maintain that as a condition of claiming one-seventh each of the free movable estate of the testator, to which they maintain they are entitled under and in terms of his will, they are not put to any election, and in particular they are not bound to waive or surrender, or to realize and pay over any part of the one-seventh shares of the testator's Argentine immovable estate to which they are entitled as aforesaid by the law of the Argentine Republic, and also by the provisions of the testator's trust-disposition and settlement and codicils; and that in respect (1.) that the bequest of the Argentine immovable estate in question is null and void and should be held *pro non scripto*, and (2.) that in any event they have never made and are not now making any claim inconsistent with the scheme of the testator's testamentary writings. Further, they maintain that they are not put to their election, because in respect of the rules of the Argentine law above set forth it is not possible for the claimants to waive or surrender their shares of the Argentine immovable property or any part thereof to the purposes of the testator's testamentary writings, nor is it possible for the trustees to hold and administer the said immovable estate under and in terms of the said testamentary writings." This case has been the subject of most careful and able argument, and after very full consideration I have come to the conclusion

H. L. (Sc.)

1920

BROWN

v.

GREGSON.

Viscount Finlay

H. L. (Sc.) that Lord Hunter's decision was right, and that his interlocutor should be restored. The present case does not appear to me to be one in which the doctrine of election has any application.

1920
BROWN
v.
GREGSON.
Viscount Finlay.

The disposition made by the will and codicil with regard to the Argentine land was, by the law of the Argentine, a nullity. This appears clearly from the terms of the Argentine judgment at pages 92 and 93 of the Appendix. The trustees under the will took nothing, and the children of the testator took, by succession, ab intestato. The reversionary interest in favour of the Gregson children disappeared. This was not brought about by any action on the part of the appellants, but automatically by virtue of the Argentine law. The appellants did not ask for any such decision; all that they did was to appear and submit to the decision of the Court. If, by any action of theirs, the codicil in favour of the Gregson children had been invalidated the case might have borne a different aspect, but nothing of the kind took place. Mrs. Gregson, on the other hand, urged on the Argentine Court the view that the testamentary dispositions as regarded the Argentine land should be declared null. The result of which the respondents complain was not caused by any act of the appellants, and indeed it appears to be clear that it was impossible for them to undo the effect of the Argentine law in this respect so as to give effect to the provisions of the will and codicil as to the land. Three modes of doing so have been suggested: (a) It was suggested that the appellants might sell the Argentine land and hand the proceeds to the trustees. This would be something quite different from what the testator contemplated by his will and codicil. He gave the trustees a power of sale, but it is obvious that he contemplated that the land might be retained by them in their own hands for some considerable time. A sale possibly at great disadvantage for the purpose of settling the proceeds is at variance with the whole tenor of the will. What he provided in favour of the Gregson children was that to the extent of the one-seventh, a life rent in which he created in favour of their mother, the children should have a reversionary interest. No assent on

the part of the appellants could make this possible, as all trusts of land are illegal in Argentine, it being considered vital that the owner for the time being should have the absolute power of disposition. The immediate sale of the land and the settlement of the proceeds of the sale of the land is something quite different from the interest in the land in specie for which the testator provided until the trustees should think a sale expedient. (b) It was suggested in the second place that the appellants might convey the land to the trustees as individuals taking from them a back letter for the purposes of the will. I think the evidence is clear that any simulatio of this kind would be invalid. It would be a manifest attempt to evade the provisions of the law against trusts of land. (c) A third suggestion was made—namely, that the appellants should convey to the trustees so much of the Argentine land as would be equivalent to what the Gregson children would have taken under the testator's codicil, and that the trustee should execute as regards this land a declaration of trust in Scotland which, as regards all of them subject to the jurisdiction of the Scottish Courts, could be enforced against them personally by proceedings in Scotland. It is quite true that the Courts in Scotland or in England may, with regard to persons within their jurisdiction, make orders in certain cases with reference to land in a foreign country. A contract with regard to land bought may be enforced here in personam so long as it is not contrary to the *lex situs* which, with regard to real property, must be the governing law. The law on this point was laid down by Lord Cottenham L.C. in the case *Ex parte Pollard* (1) : “It is true that in this country contracts for sale, or (whether expressed or implied) for charging lands, are in certain cases made by the Courts of Equity to operate in rem; but in contracts respecting lands in countries not within the jurisdiction of these Courts they can only be enforced by proceedings in personam, which Courts of equity here are constantly in the habit of doing: not thereby in any respect interfering with the *lex loci rei sitæ*. If indeed the law of the country where the land is situate should not permit or not enable the

H. L. (Sc.)

1920

BROWN

v.

GREGSON.

Viscount Finlay.

(1) (1840) Mont. & Ch. 239, 250, 251.

H. L. (Sc.) 1920
 BROWN v. GREGSON.
 Viscount Finlay.

defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities." As the law of the Argentine forbids all trusts of land there, it appears to me that it would be contrary to the comity of nations for a foreign Court to endeavour by its jurisdiction in personam to make the land of the Republic subject to a system of trusts which its law prohibits.

Some of these suggestions are further open to objection upon a broader ground applicable to each of them. The view of the case which I have submitted as the result of the law as to election would lead to a result substantially in conformity with the wishes and intentions of the testator as far as they can be collected from his testamentary disposition, at all events much more in conformity with them than would be reached under any of the suggestions made by the respondents. What the testator desired was the division of the Argentine estate, as well as the rest of his property, between his seven children equally, but with the settlement of Mrs. Gregson's one-seventh upon her for life and then to her children. Mrs. Gregson has taken her seventh absolutely, and if she permits it to descend to her children, a result not substantially in disaccord with the testamentary disposition of the testator will be reached; if they are disinherited it will be by her act. If the contention of the respondents should prevail it would follow that in addition to the one-seventh which Mrs. Gregson has taken, the appellants would have to provide another one-seventh for Mrs. Gregson's children, so that Mrs. Gregson and her children between them would receive two-sevenths of the Argentine property, while the other six children of the testator would have their shares diminished to provide this second

one-seventh for the Gregson children. Nothing can be imagined more opposed to the desires of the testator so far as they can be collected from his testamentary dispositions, and it would be remarkable if the law of election and compensation should entail any such departure from the general scheme of the testator with regard to the disposition of his property.

H. L. (Sc.)

1920

BROWN

v.

GREGGON.

Viscount Finlay.

There are three authorities to which very special reference has been made in the course of the argument: (I.) *Douglas' Trustees v. Douglas* (1), with the comments on that case by Lord Shaw in the recent case of *Pitman v. Crum Ewing*. (2) (II.) *In re Lord Chesham* (3), and (III.) *Hewit's Trustees v. Lawson*. (4) The case of *Douglas v. Douglas* (1) was thus explained by Lord Shaw in the passage to which I have already referred: "The true reason of the case was that the doctrine of approbate and reprobate cannot be introduced where it is impossible for the person against whom it is pleaded effectively to exercise the election demanded." The last paragraph of the rubric in the case of *Douglas* is this: "Opinions, that a party cannot be said to reprobate a deed who is not put to his election by the will, express or implied, of the granter of the deed, and who is not free to approbate, and capable of approbating cum effectu." In that case it was impossible to give effect to the arrangements made by James Monteith with regard to his brother Archibald's estate. So here it was impossible by the law of the Argentine to give effect to the trust for a reversionary interest in favour of the Gregson children. The attempt in the present case is to apply a doctrine of *cy près* to the doctrine of election. The children of the testator, it is said, although they cannot render effectual the testator's devise of Argentine land on trust for the Gregson children, may do something else which would have a similar effect. No instance has been cited to your Lordships of any case of election in which such a doctrine has been laid down, and it appears to be on principle erroneous. For election there must be a free choice, and here it is the law which

(1) 24 D. 1191.

(3) 31 Ch. D. 466.

(2) [1911] A. C. 239.

(4) 18 R. 793.

H. L. (Sc.) automatically does what is complained of, and it is out of
 1920 the power of the appellants to give effect to the provisions
 BROWN of the will.

v.
 GREGSON. The same principle is illustrated in *Lord Chesham's Case*. (1)
 Viscount Finlay. There the testator had affected to dispose of certain chattels
 which turned out to have been settled as heirlooms in trust
 to go along with the mansion house. It was held in a very
 elaborate judgment of that most distinguished Equity Judge,
 Chitty J., that no case of election or compensation arose, as
 compliance with the will as to these chattels was by law
 impossible. He said (2): "But when he takes under the
 will there is nothing for him to give up, for there is nothing
 which he can give up. It seems to me to be absurd to say that
 he is put to his election merely for the purpose of making a
 deduction from his residuary legacy."

In the third of the cases cited, *Hewit's Trustees* (3), the
 testator gave legacies to his nephew, who was also his heir,
 and directed that the residue of his estate, part of which
 consisted of real property in England, should be divided
 amongst English charities. By the law of England under the
 Statute of Mortmain, as it then stood, no interest in the land
 or its proceeds could pass to charity. The legacy was void
 and the land would pass to the heir, and if the heir refused it,
 it would be treated as undisposed of. It was held that the
 heir could not be put to his election. Lord Maclaren, in
 giving the judgment of the Court, said (4): "In order
 to put a legatee to his election it must be in his power
 by waiving his objection to the will, or adverse claim, to
 perfect the right of the testamentary disponees. There is
 certainly no case in which a legatee who had not the power of
 perfecting the right of the disponees has been called on to give
 an equivalent benefit." This appears to me to be right, and
 it is exactly applicable to the present case. The appellants
 could not in any way make good the gift of a reversionary
 interest on land in the Argentine to the Gregson children.
 It was a mere nullity. As the appellants cannot in any way

(1) 31 Ch. D. 466.

(5) 31 Ch. D. 476.

(1) 18 R. 793.

(2) 18 R. 804.

make the provisions of the will as to the Argentine land effective, it follows that there is no case for compensation out of the other estate which passes to them under the will.

Upon the whole it appears to me that the appeal should be allowed and the interlocutor of Lord Hunter restored, the appellants to have their costs here and in the Inner House.

H. L. (Sc.)
1920
BROWN
v.
GREGSON.

VISCOUNT CAVE. My Lords, the facts in this case have been fully stated, and I proceed at once to consider the question of law raised by this appeal, that is to say, whether under the doctrine of election or (as it is commonly called in Scotland) of "approbate and reprobate," the appellants are disabled from claiming any share of the fund in medio representing the undistributed balance of the testator's movable estate in Scotland without making their shares of his immovable estate in the Argentine Republic available for division in accordance with the general scheme of his trust disposition and settlement.

The doctrine referred to has been frequently considered in this House, and was stated by Lord Eldon in *Ker v. Wauchope* (1) as follows: "It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to A., and gives A.'s estate to B.; Courts of Equity hold it to be against conscience, that A. should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his, but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift." The same doctrine has been affirmed by this House in a number of later cases, including *Dundas v. Dundas* (2) and *Pitman v. Crum Ewing* (3), and is now fully established as a part of the law of Scotland. On the other hand it is, I think, equally clear both on principle and

(1) 1 Bligh, 1, 21.

C. 349.

(2) 4 W. & Sh. 460; 2 Dow &

(3) [1911] A. C. 217.

H. L. (Sc.)
 1920
 BROWN
 v.
 GREGSON.
 Viscount Cave.

on authority that when the person whom it is sought to put to his election cannot by any lawful means dispose of the estate belonging to him in his own right in such manner as to give effect to the testator's intention as expressed in the instrument in question, the doctrine of election does not apply. In *Douglas v. Douglas* (1) Lord President Inglis, then Lord Justice Clerk, stated his opinion that, in order to make a proper case of election, the facts of the case must be such as to satisfy three conditions: "In the first place," he said, "I think the party who is put to his election must have a free choice, and that whichever alternative he chooses, he shall have a right absolutely to that which he has chosen, without the possibility of his right being interfered with or frustrated by the intervention of any third party. In the second place, the necessity of making the election must arise from the will, express or implied, of someone who has the power to bind the person put to his election. And, in the third place, the result of the election of one or other of the alternatives must be to give legal effect and operation to the will so expressed or implied." It is not, I think, the meaning of the third condition as laid down in the above opinion that the mere expression by the person put to his election of his willingness to give effect to the will or other instrument must be sufficient to give legal effect to the instrument, but only that a person who cannot by any lawful act on his part give effect to the instrument is not thereby disabled from taking a benefit under it. Effect was given to this exception in *In re Lord Chesham* (2) and *Hewit's Trustees v. Lawson* (3), and it is obviously both just in itself and consistent with the principle of the general doctrine.

In the present case, the main argument put forward by the appellants is that, while they "approve" the testator's settlement and are ready and willing to surrender their shares in the Argentine land to the trustees of that settlement for the purposes of their trust, they are prevented from so doing by the law of the Argentine Republic where the land is situated ;

(1) 24 D. 1191, 1208.

(2) 31 Ch. D. 466.

(3) 18 R. 793.

and accordingly that the third condition laid down by Lord President Inglis is not satisfied, and no case for election arises. It is obvious that such a plea requires close examination. The share of each of the appellants in the Argentine land is of an estimated value exceeding 18,000*l.*; and if they are permitted to retain those shares and also to share equally with the fiars of Mrs. Gregson's share in the remainder of the testator's estate, they will be placed (subject to an observation which I will make hereafter) in a position of great advantage. I have therefore thought it right to examine with care the evidence of Dr. Palacios, a barrister experienced in Argentine law, upon which the appellants rest their case. That evidence satisfies me beyond any doubt that a conveyance of the appellants' share in the land to the trustees upon the trusts of the settlement would be invalid under the Argentine law: and indeed that result seems to follow from the judgment of the Argentine Court by which the testator's settlement was declared null and void. The same evidence appears to show, though less clearly, that a conveyance to the trustees, not as trustees, but as individuals, the trustees executing a back letter or other document undertaking to hold the land for the purposes of the will, would be liable to be recalled by the grantors on the ground that the possession thereby given to the trustees would be, not a real possession, but a "simulation of ownership" and contrary to the spirit of the Argentine Civil Code. On the other hand, I do not think it is proved that a simple conveyance to the trustees without any back letter or other document limiting their complete control of the property for all the purposes of Argentine law would be ineffectual merely because they would be liable as trustees to account to the Scottish Courts for their dealings with the estate. This point was not put to Dr. Palacios; and I am not prepared to assume without evidence that such a conveyance, which would not appear to violate any principle of the Civil Code, would be invalid.

But even if it be assumed that a direct grant by the appellants of their shares in the Argentine land to the trustees, in whatever form it might be made, would be ineffective, there is

H. L. (Sc.)

1920

BROWN

v.

GREGSON

Viscount Cave.

H. L. (Sc.) 1920
BROWN
v.
GREGSON.
Viscount Cave.

another method by which, as pointed out by the learned judges of the First Division, the property could be made available for the purposes of the trust disposition and settlement. By the settlement the testator empowered his trustees to sell his estate or any part of it and to give a power of attorney for realizing his estate in South America; and, while he authorized his trustees to hold his land in that country, he recommended them, if they should not have sold the land within six years after his death, to sell it as soon as conveniently might be thereafter, unless there should then be an exceptional depression in its value, and directed that the net proceeds of such realization should be transmitted to his trustees in Scotland. By the codicil settling Mrs. Gregson's share the trustees are directed to "invest" it in their own names—a direction which assumes that it will be turned into money. It is plain, therefore, that—as Lord Mackenzie says—what was in the testator's mind was conversion of the land and not enjoyment in specie. Now, if I correctly understand the evidence as to Argentine law, there is nothing whatever in that law which prevents a holder of land in the Republic from entering into a binding contract to sell it or from executing a power of attorney enabling another person to sell it for him; and I see no sufficient reason why the appellants, who are absolute owners of their shares, should not give effect to the dominant purpose of the settlement by selling their shares, or giving a power of attorney for that purpose to a nominee of the trustees, and remitting the proceeds to this country. Against this, it is objected first that this course would impose upon the appellants the liabilities of vendors; and, secondly, that there is no equity which compels them to give effect to the testator's intention otherwise than by a simple relinquishment of the estate. The former objection would be amply covered by an indemnity which could be given by the trustees on behalf of the testator's estate. The second objection is more serious, and it is on this point that I have found the case most difficult to determine—the more so as the conclusion at which I have arrived differs from that which commends itself to some if not all of your Lordships; but, after full

consideration, I am not satisfied that the duty to elect is limited in the manner suggested. The equitable doctrine of election is founded, not on any technical ground, but on a consideration of what is fair and just; and I think that it should receive a liberal interpretation. Lord Eldon in the passage above cited from *Ker v. Wauchope* (1) treated the rule as one of "conscience." Lord Cairns in *Cooper v. Cooper* (2) referred to it as proceeding, not upon an expressed or presumed intention, but upon "the highest principles of equity." And Lord Robertson, in *Douglas-Menzies v. Umphelby* (3), stated that the doctrine "rests on no artificial rule, but on plain fair dealing." If this be so, it seems to follow that no formal objection to the application of the rule should prevail, and that, if there is any method by which a claimant under a will or other trust instrument can without illegality or breach of trust give effect in substance to the intention of the trust instrument as affecting his own property, he ought to adopt it. This view is supported by the consideration that, where a beneficiary put to his election has elected in favour of the trust instrument, he is held to be a trustee of the property in his hands, and therefore bound to dispose of it as the trustees of the trust instrument may reasonably direct. (4) Upon the whole, I am of opinion that in the present case it is within the power of the appellants to make their property in the Argentine available for the purpose to which it was destined by the testator's settlement, and accordingly that the doctrine of election is not excluded.

In reaching the above conclusion, I have not omitted from consideration two points which, though not pressed upon your Lordships in argument, were mentioned in the course of the discussion—namely, (1.) that the shares of the Argentine land which the appellants have taken as heirs of the testator, are precisely the shares which the testator provided by his settlement that they should receive; and (2.) that the share claimed by Mrs. Gregson may not improbably pass by

H. L. (Sc.)
1920
BROWN
v.
GREGSON.
Viscount Cave.

(1) 1 Bligh, 21.

(2) L. R. 7 H. L. 67.

(3) [1908] A. C. 224, 232.

(4) See *Dewar and Maitland* (1866)

L. R. 2 Eq. 834; and Trustee Act,

1893, s. 31.

H. L. (Sc.) 1920 BROWN v. GREGSON.
 Viscount Cave. succession or testamentary disposition to her children, and that if this should happen and the doctrine of election should be held applicable, they would succeed to a double portion of the testator's estate. The answer to the first point appears to be that, as the testator's disposable estate has been reduced by the action of Mrs. Gregson, his settlement takes effect upon what remains—that is to say, upon six-sevenths only of the Argentine land—and the rights of the beneficiaries must be ascertained upon that footing. As to the second point, it was admitted—and I think properly admitted—on behalf of the appellants, that Mrs. Gregson and the persons (whoever they may be) who will succeed under the settlement to her share, must for present purposes be treated as separate and independent beneficiaries, and that no valid legal argument can be founded upon a speculation as to what may happen to her estate on her death.

For the above reasons, I am of opinion that the interlocutor of the First Division is right, and I would dismiss this appeal.

LORD DUNEDIN. My Lords, I have had the advantage of reading the judgment which has been delivered by my noble and learned friend on the Woolsack. I concur in that judgment and I have really only one sentence to add.

I think the respondents fail here because what they propose should be done fails to comply with the third requisite which Lord President Inglis laid down in *Douglas' Trustees v. Douglas* (1), when he said that the result of election must be to give legal effect and operation to the will as expressed or implied. That cannot here be done in terms, and I do not think a sort of *cy près* doctrine is one that falls to be applied in such a case.

LORD MOULTON. My Lords, the facts of this case are simple. By his original will the testator, James Brown, left his property in trust in the first place for purposes which are not material to the matter under consideration in this appeal, and, after they had been accomplished, directed that the

residue should be equally divided among his seven children with a provision that if any of them should repudiate that settlement and claim their legal rights, they should forfeit all right to any share of the trust fund. By a codicil he varied this division of the residue by directing that, with regard to the share of one of his daughters—namely, Mrs. Gregson—the trustees should pay the income to her during her life and on her death the capital should pass to her issue. The aim of the testator, therefore, was originally an equal division of the residue, and this was modified only in one respect by the codicil—namely, that while the equal division should be preserved in respect of the stirpes of his children, the shares should go direct to them in the case of all but Mrs. Gregson, but that in her case the trustees should hold her share during her life subject to paying her the income, and should hand over the corpus of her share to her children only after the termination of that life interest. The estate of the testator consisted to a large extent of land in Argentina. By the laws of Argentina, no trusts are recognized in respect of land, and accordingly on the death of the testator the children succeeded automatically to the possession of the land in equal shares, and the provisions of the will were of no effect since they involved the creation of a trust ownership of the lands. The inherent failure of the trust dispositions of the will applies equally to the shares of the children of the testator and to the share of the children of Mrs. Gregson who, it has been decided, claim as independent legatees. On the death of the testator Mrs. Gregson elected to take legitim, and thus debarred herself from taking any other interest under the will. But she became owner of her share of the land in Argentina by virtue of the Argentine law in the same way as the other seventh shares in that land passed automatically to the other children. The present claim is on behalf of the issue of Mrs. Gregson (who is still alive), who claim that the other six children should surrender to the trusts of the will the shares which passed to them on the death of the testator under the Argentine law as a condition of taking their share of the residue of the property in Scotland. The Lord Ordinary found against this claim,

H. L. (Sc.)
 1920
 BROWN
 v.
 GREGSON.
 Lord Moulton.

H. L. (Sc.) but on appeal the Court of Session recalled his interlocutor
1920 and found in favour of the claim of the respondents.

BROWN v. GREGSON.
Lord Moulton. It is evident that if this finding is supported the effect will
be to render more unequal the division of the testator's property among his children. This, of course, is not conclusive, but it is not to be forgotten that the justification of the doctrine of election is that it is carrying out what it is supposed the testator (judging from the provisions in his will) would have intended to happen under the new state of things. I am convinced that he would have not so intended. In the first place, it is evident that it is impossible for the appellants to surrender their shares of the Argentine land to the uses of the will. By the law of Argentina this is impossible. The way in which the judges of the Court of Session proposed to effect it is by the children granting a conveyance of the land in favour of the trustee, the latter granting unico contextu the appropriate declaration of trust. To my mind such a proceeding would be an evasion of the Argentine law, and I cannot think that it is permissible to our Courts to lend themselves to a sham which would in reality place the Argentine lands in the hands of a nominal owner whose true position was only that of a trustee. It must be remembered that the refusal of Argentina to permit lands to be held by a trustee is based on grounds of public policy. They insist that the person in whose name the lands stand shall be the true owner. Our ideas of land tenure may not agree with theirs, but we are bound to accept and act loyally up to the laws as to land which obtain there. I am therefore of opinion that the proposed solution of the question is quite unacceptable. Nor do I see any other way in which the lands could be made effectively subject to the trusts of the will. The terms of the will are such that it is clear to me that it was the intention of the testator that they should be capable of being held as lands until favourable conditions arose for converting them into money, and I can see no reason why these matters should be passed by in considering whether or not the lands could in substance or in form be put under the trust provisions of the will, so as to carry out the intentions of the testator.

I therefore come to the conclusion that it is impossible for the appellants, by any act of their own, to render the lands subject to the trusts of the will. The lands have become theirs, not by their own act, but automatically by the effect of the Argentine law, and as they cannot undo this in such a way as to allow the trusts of the will to operate upon them, the doctrine of election does not apply to them. I am of opinion therefore that this appeal should be allowed, that the interlocutor of the Lord Ordinary should be restored, and that the respondents should pay the costs here and in the Court below.

H. L. (Sc.)
1920
BROWN
v.
GREGSON.
Lord Moulton.

Interlocutor of the First Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored: Cause remitted back to the Court of Session to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the action in the Court of Session, and also the costs of the appeal to this House.

Lords' Journals, May 6, 1920.

Agents for the appellants: John Kennedy W.S., for Thurburn & Fleming, Solicitors, Keith, and Macpherson & Mackay, S.S.C., Edinburgh.

Agents for the respondents: Holmes, Son & Pott, for Alex. Morison & Co., W.S., Edinburgh.

J. C. *

[PRIVY COUNCIL.]

1920
May 4.

TRINIDAD SHIPPING AND TRADING }
 COMPANY, LIMITED } APPELLANTS ;

AND

G. R. ALSTON AND COMPANY . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND
 TOBAGO.

*Contract—Illegality by Foreign Law—Shipping—Agreement to pay Rebates
 on Freights—Performance of Contract of Carriage—Liability to pay Rebates.*

An agreement made in British territory to allow rebates upon freights paid for the carriage of goods by sea to a foreign country cannot be repudiated, after the goods have been carried and the freights paid, on the ground that payment of the rebates would subject the shipowners to penalties under legislation of the foreign country.

Judgment of the Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court of Trinidad and Tobago (January 13, 1919) reversing a judgment of Russell J.

The respondents sued the appellants to recover 159*l.* 0*s.* 6*d.*, the amount of agreed rebates upon freights paid by the respondents for the carriage of goods from Trinidad to New York by the appellants' steamships between September 7, 1916, and October 30, 1917.

The facts appear from the judgment of their Lordships.

The trial judge, Russell J., dismissed the action. On appeal that decision was reversed and judgment given for the respondents.

1920. April 20. *R. A. Wright K.C.* and *J. A. Stamp* for the appellants. By the Act of Congress of September 7, 1916, which established the United States Shipping Board, payment of the rebates became illegal in the United States and would subject the appellants to heavy penalties. When the appellants, by accepting the goods for carriage, agreed to

* *Present* : VISCOUNT HALDANE, LORD MOULTON and LORD PARMOOR.

make the rebates in accordance with the circular neither party knew of the Act. Foreign law being a question of fact, the agreement to pay the rebates was made under a mistake with regard to a most material fact; the agreement consequently is not enforceable. Further, the appellants, to the knowledge of the respondents, were amenable to the laws of the United States by reason of their branch office in New York and of their steamers calls at ports of the United States. It was therefore a condition of the contracts that the payment of rebates should cease if it became illegal according to the law of the United States, or inconsistent with the appellants maintaining the regular service of their steamers between Trinidad and New York. [Reference was made to *Ralli Brothers v. Compañia Naviera Sota y Aznar*. (1)]

Footte K.C. and *Moritz* for the respondents. The Act of Congress upon its true construction did not apply to the contracts between the appellants and the respondents. But even if the Act applied it afforded no defence to this action. The contracts were made in British territory, and there is no ground for holding that it was intended that American law should apply: *In re Missouri Steamship Co.* (2) It is not established that the contracts were made under any common mistake of fact. The goods having been carried and the freights paid, the appellants cannot now refuse to return the rebates in accordance with the contracts. [They were stopped.]

J. C.
1920
TRINIDAD
SHIPPING
Co.
v.
ALSTON.

May 14. The judgment of their Lordships was delivered by

LORD PARMOOR. This is an appeal against an order of the Supreme Court of Trinidad and Tobago setting aside the judgment delivered by the trial judge, Russell J. The action was brought to recover the sum of 159*l.* 0*s.* 6*d.*, claimed to be due as a rebate on freights paid for the carriage of cocoa and cocoanuts from Trinidad to New York. The facts are not in dispute, and may be shortly stated.

The respondents are general merchants, carrying on business at the Port of Spain, Trinidad. The appellants are ship-

(1) [1920] 1 K. B. 614; [1920] 2 K. B. 287.

(2) (1889) 42 Ch. D. 321.

J. C.
1920
TRINIDAD
SHIPPING
Co.
v.
ALSTON.

owners incorporated in the United Kingdom, with their head office in London, and with branch offices at Port of Spain, Trinidad, and New York, U.S.A. They are members of a shipping conference, in which certain ship-owning companies have mutual arrangements for fixing uniform freight tariffs. These companies, before October 30, 1917, allowed rebates on freight to traders, conditional on their shipping exclusively by steamers belonging to members of the Conference.

The tariff in force at all material dates was headed : "Freight Tariff Trinidad to New York. Effective 26th February, 1916," and after a number of rates for various merchandize it continues : "The rate on cocoa is subject to deferred rebates to conference shippers of 10 per cent. and 5 per cent. on the net freight paid. The rate on cocoanuts is subject to a deferred rebate of 25 per cent. to conference shippers payable on June 30 and December 31 in each year on the nett freight paid on shipments made during the previous periods of six months ending December 31 and June 30, respectively."

In the present instance the rebates claimed come within the terms stated in the general notice. The respondents have complied with the condition of exclusive shipment in steamers belonging to members of the conference ; their goods were shipped in a steamer of the appellants and duly carried to New York ; and they have paid freight thereon due under the terms of the bill of lading, thus fulfilling all the conditions which, under British law, would entitle them to claim the sum of 159l. 0s. 6d. It was argued on behalf of the appellants that the rebates formed part of a continuing contract between the parties, but in the opinion of their Lordships, there is no ground for this contention. Each consignment was carried on a separate contract, and it is a matter of business convenience that the amount due as rebate was paid half-yearly on shipments made during the previous period of six months. The said tariff remained in force without any alteration until October 30, 1917, when the appellants gave notice to discontinue the payment of rebates on the ground that they had been rendered illegal, as regards shipments to New York, under

the provisions of an Act of Congress of the U.S.A., which was approved, and had come into operation more than a year previously, on September 7, 1916.

The contracts under which the rebates are claimed are contracts between British subjects, made in British territory, and therefore to be governed by British law. It is clear that the *lex loci contractus* was British, and that no such question arises as in the case of *In re Missouri Steamship Co.* (1) By British law there is no illegality in a rebate agreement such as was made between the appellants and respondents. The contracts have not been frustrated or rendered impossible of performance; on the contrary the goods have been landed at New York, the freights in respect thereof have been paid, and all conditions have been fulfilled which, apart from any special defence founded on the Act of Congress, would entitle the respondents to claim payment.

The case of the appellants is based on the allegation that the payment of the rebates would render them liable to heavy penalties, under the Act of Congress approved and brought into operation on September 7, 1916. It was argued on behalf of the respondents that this Act had no application to the contracts in question, but in the opinion of their Lordships it is not necessary to give any opinion on the construction of the Act of Congress, or to decide whether or not the appellants have rendered themselves liable to penalties. If the respondents are right in this contention, it is clear that the appellants would be liable to pay the rebates; but the same result would follow, though the appellants had rendered themselves liable to a penalty, uncertain in amount, but of which the maximum is 25,000 dollars. It may be that the appellants might have declined to ship the goods on the ground that the allowance of a rebate might render them liable to penalties under the laws of the U.S.A. It is not necessary to express any opinion on this point. The appellants did not decline to ship the goods. It is said that when the liability for rebate was incurred, neither party was aware of the change in the law of the U.S.A.

(1) 42 Ch. D. 321.

J. C.

1920

TRINIDAD
SHIPPING
Co.

v.
ALSTON.

J. C.
1920
TRINIDAD
SHIPPING
Co.
v.
ALSTON.
—

The truth is that the appellants have had the advantage of the contracts of carriage, have been paid freights due in respect thereof under the various bills of lading, and are now refusing to fulfil the collateral contract for a rebate allowance on the faith of which the respondents consigned their goods by the appellants for carriage to New York. In the opinion of their Lordships, whatever may be the true construction of the Act of Congress, that refusal cannot be supported.

Their Lordships concur in the judgment of the Supreme Court of Trinidad and Tobago, and will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *Parker, Garrett & Co.*

Solicitors for respondents : *J. N. Mason & Co.*

J. C.*

[PRIVY COUNCIL.]

1920
May 14.

RAJAPAKSE APPELLANT ;

AND

FERNANDO RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Roman-Dutch Law—Grantor without Title—Title acquired after Grant—Feeding Estoppel—Registration of Deeds.

By Roman-Dutch law as existing in Ceylon, where a grantor has purported to grant an interest in land which he did not then possess, but afterwards acquires, the benefit of his subsequent acquisition goes automatically to his grantee. The existence in Ceylon of a system of compulsory registration may under certain circumstances bring about a modification in the application of this doctrine, but gives rise to no difficulty when, as in the present case, the earlier deed is registered and is the only deed relating to the land registered at the time.

Judgment of the Supreme Court affirmed.

APPEAL from a judgment of the Supreme Court (March 6, 1919) affirming a judgment of the District Court of Kurunegala (December 31, 1917).

* *Present* : VISCOUNT HALDANE, LORD MOULTON and LORD PARMOOR.

The appellant sued the respondent in the District Court to recover possession of certain land described in the plaint as being two contiguous allotments called Ihalamedagodawatte and Medagoda Mukalana, according to specified boundaries, and containing 40 a. 0 r. 35 p. The respondent by his answer denied the appellant's title and set up a title in himself; he also pleaded that he had acquired a possessory title.

J. C.

1920

RAJAPAKSE
v.
FERNANDO.

The material facts upon which the alleged titles respectively were based appear from the judgment of their Lordships.

The District Judge dismissed the suit, holding that the title acquired by Carry from the Crown in 1912 enured to the benefit of the respondent.

An appeal to the Supreme Court was dismissed. Ennis J. was of opinion that Ordinance 7 of 1840 did not include in its scope a transmission of property by operation of law; and that the doctrine of English law known as feeding the estoppel, and the similar doctrine in Roman-Dutch law of "confirmation," effected a transmission of that character. With regard to the effect of registration, he said that deeds conveying an equitable estate before the land had been granted by the Crown were registrable, and being registrable obtained the benefit of priority of registration. Shaw J. delivered a judgment to the same effect, both learned judges discussing earlier decisions of the Supreme Court. The appeal is reported at 20 Ceylon N. L. R. 301.

1920. *De Gruyther K.C.* and *Parikh* for the appellant. The lands in suit are not identical with those conveyed to Carry by native villagers between 1899 and 1905. The native villagers had no title to those lands, and Carry first obtained a title in 1912 by the Crown grant. The deeds constituting the appellant's title from that root were duly registered under the Land Registration Ordinance, 1891. The grant by Carry to do that was not properly registered, since the land was described as being in the village of Medagoda, and not of Ihalamedagoda. But even if that registration was valid, the decision of the Supreme Court applying the doctrine of feeding the estoppel was erroneous. The decision was based

J. C.
1920
RAJAPAKSE
v.
FERNANDO.

upon Voet, bk. 21, tit. 3, ss. 1, 2, 3 (1), but the application of the principle is now excluded in Ceylon by Ordinance 7 of 1840, which by s. 2 provides that no transfer of, or agreement affecting, immovable property shall be of any force unless it is in writing, signed and attested as therein prescribed. The Supreme Court had taken that view in *Mohammed Bhoy v. Lebbe Maricar* (2),¹ following an earlier decision; also apparently in *Kadirawelpulle v. Pina* (3) and *Alwis v. Fernando*. (4) Further, the application in Ceylon of the principle would be inconsistent with the system of compulsory registration prescribed by the Land Registration Ordinance, 1891.

Cyril Atkinson K.C. and *Dighton Pollock* for the respondent. The passage in Voet (5) clearly shows that the doctrine known in English law as feeding the estoppel formed part of Roman-Dutch law. Its application in Ceylon is not excluded by Ordinance 7 of 1840 any more than its application in England is excluded by the Statute of Frauds. Since the decision of the Supreme Court in the present case that Court exhaustively

(1) Voet, Bk. 21, tit. 3 (De exceptione rei venditæ et traditæ), Berwick's translation:—

Sect. 1: "Since on the confirmation of the right of an alienator the originally invalid right of his alienee also becomes confirmed from the very moment that the first vendor acquired the ownership, and therefore the ownership, from that time annexed to the original purchaser, could not be taken away from him without his own act or consent; hence he has the right of suing his vendor or a third party-possessor on account of the loss of his possession, and of defeating his opponent's plea by the replication of ownership. . . ."

Sect. 2: "But if the purchaser still possesses the thing, and the same persons that are liable to be sued (by him) in respect of (its) eviction bring an action to evict the property from him, it is in his discretion whether he will suffer eviction and

afterwards, when it has been taken from him, sue the successful party by the action 'ex stipulatu in duplum,' or by the action 'ex empto' for the 'id quod interest' (damages); or whether he will prefer to keep the property and repel his vendor and other like persons seeking to evict him either by the 'exceptio rei venditæ et traditæ' or by the 'exceptio doli'"

Sect. 3: "This plea may be opposed not only to the original vendor but to all those who, claiming under him, endeavour to evict a thing from the first purchaser; such as those to whom the vendor has again alienated the same thing, whether by an onerous or a lucrative title, after he became owner."

- (2) (1912) 15 Ceylon N. L. R. 466.
- (3) (1889) 9 Sup. Ct. Circ. 36.
- (4) (1911) 14 Ceylon N. L. R. 90.
- (5) See note (1) above.

considered the question in *Gumatilleke v. Fernando* (1), and affirmed the view arrived at in the present case. *Mohammed Bhoy v. Lebbe Maricar* (2) was not a case, as this is, of a person defending his possession, but of a person claiming possession by an application of the principle. In *Alwis v. Fernando* (3) the validity of the doctrine in the case of a purported sale was not denied. The decision in *Kadirawelpulle v. Pina* (4) was based entirely upon priority of registration. No difficulty of that kind arises here because the grant of 1909 was registered in that year; the Land Registration Ordinance, 1891, s. 16, permits the registration of an equitable title. There was no registration of a transfer of interest to the appellant's predecessors before 1915. The registration of the grant to de Mel was notice to the appellant's predecessors; and the possession of the respondent was itself notice of his interest: *Holmes v. Powell* (5), a case of registered title. Further, the registration of the deeds upon which the appellant relies was defective for non-compliance with s. 24 of the Land Registration Ordinance, 1891, which requires that the folio and volume of the register at which a previous registration has been made shall be stated. This omission must have been intentional on the part of Carry, and his mortgage to the appellant's predecessor in title was fraudulent. [Reference was also made to *Doe v. Oliver*. (6)]

De Gruyther K.C. replied.

May 14. The judgment of their Lordships was delivered by

LORD MOULTON. In this case the appellant who was plaintiff in the action brought an action of ejectment against the defendant in respect of certain lands described in a grant by the Crown to one Thomas Carry dated February 22, 1912, and registered in the Land Registry of the district in folio F 120/125. The lands are therein described as in the village of Ihalamedagoda. The date of the registration is

J. C.
1920
RAJAPAKSE
v.
FERNANDO.

(1) Since reported (1919) 21 Ceylon N. L. R. 257.

(2) (1912) 15 Ceylon N. L. R. 466.

(3) (1911) 14 Ceylon N. L. R. 90.

(4) (1889) 9 Sup. Ct. Circ. 36.

(5) (1856) 8 D. M. & G. 572.

(6) (1829) 5 Man. & R. 202; 2 Sm. L. C., 12th ed., 746.

J. C. October 16, 1914. This grant is the foundation of the title
1920 of the appellant, but it is not necessary to set forth the
RAJAPAKSE various steps by which the appellant traces his title from
v. the said Crown grant as no objection is raised to them.
FERNANDO.

The respondent's case is that the lands in question were conveyed by the said Thomas Carry to his predecessors in title by a deed dated December 11, 1909, registered on December 15, 1909, in folio F 81/366. As that date was prior to the date of the registration of the Crown grant to Thomas Carry the appellant contends that the latter was improperly registered by being placed in a different folio, and that further the said Thomas Carry was incapable of giving a title to the lands in question to anyone other than the respondent's predecessors in title, inasmuch as the title acquired by the said Thomas Carry under the Crown grant went automatically by operation of law to complete the title purporting to have been granted by the said Thomas Carry by the transfer of December 11, 1909, above referred to.

The relevant facts are as follows. Before the events referred to above Thomas Carry had obtained a Crown grant of a parcel of the lands in question, and purported to purchase other parcels of them from various native occupiers. He formed an estate which he termed the Medagoda estate out of these various parcels, and it was that estate which by the deed of December 11, 1909, he purported to convey to the respondent's predecessors in title. The various conveyances from the native occupiers were duly registered, but it is not necessary to refer to them, more particularly as it is admitted that the occupiers had no further title than was given to them by their being in possession of the lands, and that the real title was in the Crown.

Thomas Carry therefore in conveying the lands in question to the predecessors in title of the respondent by the deed of December 11, 1909, was conveying that to which he himself had no valid title. But he obtained from the Crown a grant of the lands in question on February 22, 1912.

Both the Courts below have found that the lands in question were covered by the conveyance from Thomas Carry to the

respondent's predecessor in title, which (as has already been stated) was dated December 11, 1909, and registered on December 15, 1909, in folio F 81/366, and their Lordships see no reason to doubt the correctness of this conclusion, apart from the fact that there are two concurrent findings of fact to this effect in the judgments in the Courts below.

J. C.
1920
RAJAPAKSE
v.
FERNANDO.

It is clear therefore that the registration of the Crown grant should have been in the same folio as the registration of the conveyance of December 11, 1909. In any case, under s. 24 of the Land Registration Ordinance, 1891, the later registration must state the volume and folio of the register in which such property has been previously registered. The language of the section makes this imperative, and it is obvious that observance of this provision is vital to the effectiveness of a system of registration. In the present case Thomas Carry, who held the Government grant and must have been party to the registration, was fully aware of the earlier conveyance, and the infringement of the regulation in s. 24 must have been intentional on his part. Their Lordships are not prepared to hold that the registration of the Crown grant was under these circumstances valid, or that it had any effect at law.

But it is not necessary to discuss the effect of this upon the appellant's title, because their Lordships are of opinion that by the Roman-Dutch law as existing in Ceylon, the English doctrine applies that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or, as it is usually expressed, "feeds the estoppel." When, therefore, on February 22, 1912, Thomas Carry acquired from the Crown the title to the lands which he had conveyed by the deed of December 11, 1909, the benefit of that title accrued to the grantees under that deed, i.e., the respondent's predecessors in title. It is possible that the existence of a scheme of compulsory registration might under certain circumstances bring about modifications of the application of that doctrine to land in Ceylon, but in the present case no such difficulties arise, because the earlier conveyance was duly registered and

J. C. was the only deed relating to the lands in question, which was
1920 registered or even existing at the time.

RAJAPAKSE A great part of the argument on behalf of the appellant
v.
FERNANDO. was based on the fact that in the register of the sale of the land
by the Crown to Thomas Carry it is spoken of as the Ihala-
medagoda estate, and in the registration of the deeds relating
to the title of the appellant, it is registered as being in the
village of Ihalamedagoda, whereas in the deeds relating to the
respondent's title, it is spoken of as being in the village of
Medagoda. But the provisions of s. 24 of the Ordinance turn
on the identity of the lands and not upon the identity of the
nomenclature by which they are described, and their Lordships
have no doubt that the change in name did not connote any
change in identity and was not understood so to do by anyone
concerned.

Their Lordships are therefore of opinion that the decisions
in the Courts below were right, and will humbly advise His
Majesty that this appeal should be dismissed with costs.

Solicitor for appellants : *Edward Dalgado.*

Solicitors for respondent : *Freeman & Cooke.*

[PRIVY COUNCIL.]

THE URNA.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

J. C.*

1920

May 14.

Prize Court—Conditional Contraband—Neutral Port—Consignment to selling Agent—Advances by Agent—"The Consignee of the Goods"—Order in Council of October 29, 1914, cl. 1 (iii.).

The Declaration of London Order in Council No. 2, of October 29, 1914, provided, inter alia, that conditional contraband should be liable to capture on board a vessel bound for a neutral port "if the ship's papers do not show who is the consignee of the goods."

The neutral appellants shipped conditional contraband goods from America to Copenhagen under a bill of lading making them deliverable to their selling agent at that port, who advanced to them 70 per cent. of the value of the goods. The evidence showed that the goods were destined for Germany. There was no evidence of any special arrangement between the appellants and their agent precluding the appellants from controlling the ultimate destination of the goods :—

Held, that the goods were properly condemned.

The Louisiana [1918] A. C. 461, 471 applied.

Judgment of the Prize Court affirmed.

APPEAL from a judgment of the President of the Admiralty Division (in Prize). (1)

The appellants, a company incorporated in the United States, shipped 9077 boxes of Californian prunes (conditional contraband) from America under a bill of lading by which the goods were to be delivered at Copenhagen to one Hansen or his assignee. Hansen had for some years acted as selling agent for the appellants at Copenhagen. Under a verbal arrangement the appellants drew on Hansen for 70 per cent. of the value of the consignment, and Hansen accepted and paid the draft. The goods were seized on December 24, 1915.

By the Declaration of London Order in Council No. 2, of October 29, 1914, the provisions of the Declaration of London, which abrogated the doctrine of continuous voyage

* *Present* : LORD SUMNER, LORD PARMOOR, LORD WRENBURY, THE LORD JUSTICE-CLERK, and SIR ARTHUR CHANNELL.

(1) Unreported.

J. C. in the case of conditional contraband, were adopted subject
 1920 to certain modifications. One of these modifications provided
 THE URNA. that conditional contraband was to be "liable to capture on
 board a vessel bound for a neutral port if the ship's papers
 do not show who is the consignee of the goods." (1)

The President (Lord Sterndale) condemned the goods on
 April 14, 1919, finding that there were circumstances of the
 case which threw upon the appellants the onus of showing
 that the goods were not destined for Germany, and that they
 had failed to discharge that onus. The learned President
 did not deal in his judgment with the Order in Council, the
 argument based upon it not being pressed before him.

1920. March 19, 22. *Inskip K.C.* and *Ballock* for the
 appellants.

Gavin Simmonds (with him *Sir Gordon Hewart A.-G.*) for
 the respondent, the Procurator-General.

Reference was made to *The Louisiana* (2); *The Kron-*
prinzessin Victoria (3); *The Hellig Olav* (4); *The Kronprins*
Gustaf. (5)

May 14. The judgment of their Lordships was delivered by

LORD PARMOOR. The appellants are a corporation of the
 State of Illinois, doing business in the States of California,
 Illinois, New York, and in other places in the United States,
 as packers, shippers, and dealers in dried fruits and other
 food stuffs. Alf Hansen is a Danish subject carrying on
 business as a merchant at Copenhagen, who has acted as
 selling agent for the claimants at Copenhagen for some years.
 On April 14, 1919, the President of the Prize Court made
 an order condemning 9077 boxes of California prunes as
 good and lawful prize as contraband of war. These boxes
 were shipped by the appellants on board the *Urna* on
 November 26, 1915, for carriage to Copenhagen, and were

(1) This Order in Council was to the seizure of contraband goods.
 amended and explained by an Order (2) [1918] A. C. 461.
 of March 30, 1916; it was withdrawn (3) [1919] A. C. 261.
 by an Order of July 7, 1916, which (4) [1919] A. C. 526.
 made clearer provisions with regard (5) [1919] P. 182.

consigned for sale to Alf Hansen. On December 24, 1915, the boxes were seized as prize, and required to be discharged at the port of Bristol.

J. C.

1920

THE URNA.

At the hearing before their Lordships two questions were raised: (1.) Whether the goods, which were conditional contraband, were destined for Germany? (2.) Whether they were protected by the Order in Council of October 29, 1914?

A statistical table was put in evidence, which proved that in 1915 the imports into Denmark of dried fruits were 18,651 tons, whereas the annual average of imports before the war (1911-1913) were 6300 tons. The President has found that the statistical evidence establishes a case which throws upon the appellants the onus of showing that the goods were not going to Germany. Their Lordships concur in this opinion. There is ample statistical evidence to place an obligation on the appellants to show that the destination of the goods is innocent. The President further finds that it is impossible for him to say that the appellants have discharged the onus thrown upon them, and their Lordships concur in this finding.

The goods are said to have been consigned in pursuance of a verbal agreement made between Alf Hansen, the agent of the appellants in Copenhagen, and A. W. Porter, a vice-president of the appellants, at that time in Copenhagen. Under this Alf Hansen undertakes to sell goods for the Armsby Company, advancing 70 per cent. of the value. There is no evidence that any consignment other than the boxes of California prunes was sold on these terms, and Hansen received notice of shipment for the first time on November 29, 1915. So far as has been ascertained, no goods belonging to the claimants have been previously condemned except in the case of what is called the "Hammerstrom Group." In this case it is said that the appellants did not put in an affidavit through inadvertence, but it is not denied that the appellants were from time to time in fact sending goods to Germany. The President in his judgment deals at length with a letter written in July, 1915, from the firm of J. and T. Lauezzari, and with the explanation made in the affidavit of Mr. Lester

J. C. on behalf of the appellants. In this it is stated that
1920 J. and T. Lauezzari were simply a centre from which a
THE URNA. quotation from the appellants was radiated through Conti-
nental Europe. J. and T. Lauezzari, however, carried on
business at the same address as Jantzen and Deeke, who
carried through a transaction with Broderna Hammerstrom
for the appellants, with the intention of sending on contra-
band goods to an enemy destination. The explanation given
by Mr. Lester is set out in the judgment of the President.
Their Lordships concur with the conclusion of the President
that the explanation put forward by the appellants is not
satisfactory, and it is not necessary to restate all the facts
in detail.

In addition to this instance there are a series of intercepted
messages and letters from the appellants of a character not
free from suspicion. On November 23, 1914, a wireless message
was sent to Christian Eckardt, of Hamburg, indicating that
the appellants were dealing, or prepared to deal, with him.
Of this intercepted message no explanation is given. A more
important message of March 17, 1915, was sent to the Bulsing
Company, of Rotterdam, asking them to notify Behn & Son, of
Hamburg, that the appellants had consigned apricots to them
at Rotterdam. Again no explanation is forthcoming. On
November 4, 1915, a wireless message was sent to ship peaches
to Rabe Neuschafer, of Hamburg, under cover of the name
of Rudolf Kolmodin, of Stockholm. In addition to direct
dealings with Germany, there were consignments from the
appellants to Nils Soeron, of Gothenburg, and Ekstrom and
Leffler, of the same city, both of whom had been engaged
in assisting German trade during the war, as stated in the
affidavit of Mr. Greenwood. There were also consignments
to Clarholm and Bergman, of Gothenburg, who are merchants
dealing in dried fruits and other colonial products. There
is, however, no evidence that Clarholm and Bergman have
been engaged in forwarding goods to Germany. All these
transactions tend to confirm the judgment of the learned
President that the goods in question were conditional
contraband destined for Germany, and that they are subject

to condemnation unless it can be established that they are protected by Order in Council of October 29, 1914. J. C. 1920

In the opinion of their Lordships it would be impossible to say that an ordinary agent for sale is "the consignee of the goods" within the Order in Council of October 29, 1914. Such an agent would not have the real control of the destination of the goods. It would be within the power of his principal to give instructions from time to time. The meaning of the words in the Order was decided in *The Louisiana* (1): "The consignee of the goods in the Order in Council of the 29th October, 1914, means some person other than the consignor to whom the consignor parts with the real control of the goods." THE URNA.

In the present instance Alf Hansen was in the position of an agent for sale who had advanced 70 per cent. of the value of the goods consigned to him. Whatever rights of lien or otherwise Alf Hansen might have, so long as the advance made by him in respect of the goods was outpaid and outstanding, there is no evidence that there was any special arrangement that he would not be subject to the direction of the appellants in making sales, or that the appellants might not from time to time determine their ultimate destination. In respect of his advance, and apart from special conditions, the agent would not be in a better position to control the destination of goods, owing to his advance of 70 per cent. of their value, than the pledgee of the whole cargo of a ship seized as prize; and their Lordships have determined in *The Odessa* (2) that legal ownership is the sole criterion. In this case admittedly the legal ownership remains in the appellants. It is only as such owners that they are entitled to make their claim. The following passage occurs in the judgment of Lord Mersey: "If special rights of property created by the enemy owner were recognised in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow on the security of the goods an amount approximating to their value from a neutral lender, and create in

(1) [1918] A. C. 461, 471.

(2) [1916] 1 A. C. 145, 154.

J. C.
1920
THE URNA.

favour of such lender a charge or lien or mortgage on the goods in question."

In the opinion of their Lordships the advance of 70 per cent. by Alf Hansen does not, in the absence of any other special conditions, alter the character of the ownership of the goods in question, or constitute the agent for sale a consignee within the meaning of the Order in Council of October 29, 1914. At the same time their Lordships desire to say that they find no evidence to suggest that Alf Hansen did not act throughout in an honourable and straightforward manner.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *Parker, Garrett & Co.*

Solicitor for respondent : *Treasury Solicitor.*

J. C. *
1920
May 4.

[PRIVY COUNCIL.]

THE NOORDAM (No. 2) AND OTHER SHIPS.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

Prize Court—Securities—Seizure from Letter Mail—"Goods"—"Enemy property"—"Enemy origin"—Hague Convention No. 11, art. 1—Reprisals Order in Council of March 11, 1915, art. 4.

Bearer bonds and coupons shipped by letter mail in Dutch steamships for carriage from Dutch ports to New York were seized in the course of the voyage, and their detention claimed under the Reprisals Order in Council of March 11, 1915. The securities in some cases had been bought in Germany for American buyers, and had been received, and were being forwarded to them, by the buyers' Dutch agents; in some other cases they had been bought in Germany by Dutch dealers for prompt resale, or for delivery under sales already made, in the United States:—

Held (1.), that the securities were not "postal correspondence" so as to be exempt from seizure under Hague Convention No. 11; (2.) that

**Present* : LORD SUMNER, LORD PARMOOR, LORD WRENBURY, the LORD JUSTICE-CLERK, and SIR ARTHUR CHANNELL.

they were "goods" within the meaning of the Order in Council; (3.) that although the securities in the cases above stated were not to be deemed "enemy property" for the purpose of the reprisals Order, they were goods of "enemy origin" within its meaning, and consequently liable to detention.

Held, further, without deciding what constituted "the conclusion of peace" under art. 4 of the Order in Council, that there was nothing to prevent the proper officer of the Crown applying forthwith for the release of the securities in question to the respondents.

Judgment of the Prize Court varied.

J. C.
1920
THE
NOORDAM.

CONSOLIDATED APPEALS from a judgment and decrees of the President of the Admiralty Division (in Prize) (1) dated May 30, 1919.

The appeals were by the Procurator-General from decrees of the President (Lord Sterndale) ordering the release to the respondents of certain bearer bonds and securities seized in Dutch mail steamships while in course of transit from Dutch ports to New York, and rejecting a claim for their detention under the Reprisals Order in Council of March 11, 1915.

The facts appear from the judgment of their Lordships.

1920. March 23, 25. *G. Lawrence* (with him *Sir Gordon Hewart A.-G.* and *Sir Ernest Pollock S.-G.*) for the appellant, the Procurator-General. The securities were liable to detention under the Reprisals Order in Council of March 11, 1915. They were "goods" within the meaning of that Order: *The Frederik VIII.* (2) In those cases in which securities had been bought in Germany by Americans the securities were to be deemed as still "enemy property," since the enemy character of goods cannot be divested during transit: *The United States.* (3) The same principle applies to those securities which had been bought in Germany by Dutch buyers and were being forwarded to purchasers or intended purchasers from them. The transit in those cases was really from Germany to America, the purchase by Dutch dealers being merely an incident to that transit. In any case the securities were goods of "enemy origin" within the meaning of the Order in Council. *The Leonora* (4) shows

(1) [1919] P. 255.

(2) [1917] P. 43.

(3) [1917] P. 30.

(4) [1919] A. C. 974.

J. C.
1920
THE
NOORDAM.

that the real test is whether the goods formed part of the realizable stock of the enemy. The Order was notice to the world that commodities could not be bought from Germany without liability to seizure and detention. The view adopted by the President would deprive the Order of its intended effect, since it would follow that all commodities sold by Germany to neighbouring neutral countries cease to be not only enemy property but also goods of "enemy origin."

Sir Erle Richards K.C. and *Sir Robert Aske* for the respondents *Zimmermann* and *Forshay*; *Dunlop K.C.* and *Darby* for the respondents *Wiegman's Bank*; *Inskip K.C.* and *T. Mathew* for the respondents the *American Express Co.* The securities were not "goods" within the meaning of the Order in Council: *In re Cleland* (1); Sale of Goods Act, 1893, s. 62. That question was not argued for the claimant in *The Frederik VIII.* (2) The Order refers to the goods being "discharged," which is inappropriate if choses in action are included. The securities were not enemy property in fact. The rule that in prize the enemy character of property cannot be divested in transit applies only to sea transit, since it is only at sea that a capture can take place: *The Baltica* (3); *The Dirigo*. (4) *The United States* (5) is distinguishable; the goods in that case had been sent direct from factories in Germany to purchasers in the United States. The doctrine of continuous voyage relates only to the question of enemy destination, and has no bearing upon the question whether goods are enemy property. The words "enemy property" in the Order must be construed in their natural sense; the Order should not be read so as to affect the rights of neutrals unless it does so in clear terms. The securities having become vested in neutrals before the voyage were not goods of "enemy origin." The words "of enemy origin" cannot be extended to all commodities which at any time after March 11, 1915, formed part of the common stock of an enemy country. It is not of great importance now if the securities are held liable

(1) (1867) L. R. 2 Ch. 466, 477.

(2) [1917] P. 43.

(3) (1857) 11 Moo. P. C. 141.

(4) [1919] P. 204.

(5) [1917] P. 30.

to detention as goods of "enemy origin," but if they are held to be "enemy property" the proceeds of their sale would be liable under the Treaty of Peace to be set off against debts due from Germany.

J. C.
1920
THE
NOORDAM.

G. Lawrence in reply. The Naval Prize Act, 1864, s. 2, defines "goods" as including everything (other than a ship) which is subject to adjudication in prize. That definition being included in an Act dealing with matters of prize was rightly applied in *The Frederik VIII.* (1) In prize matters "goods" has a wider signification than at common law: *Lindo v. Rodney.* (2) [Reference was also made to *Bullock v. Dodds.* (3)] The word "origin" in the phrase "enemy origin" is not used merely in reference to the voyage upon which the ship is engaged; to so hold would render the Order of little practical utility.

May 4. The judgment of their Lordships was delivered by

LORD SUMNER. This appeal relates to various bearer securities found in the mails carried on voyages from Holland to the United States by several neutral mail steamers which were stopped and diverted under the Reprisals Order in Council of March 11, 1915. They were all issued by extra-European Governments or companies, though in some cases they were parts of the issues appropriated to Germany. The respondents are neutral claimants, to whom Lord Sterndale P., sitting in Prize, released these securities. The Procurator-General appeals. He contends that within the meaning of the Order they all were "goods," and were either enemy property or of enemy origin, and as such should be either condemned or detained. The respondents accept the Order in Council as valid, but contest its application and construction. In addition to traversing each contention of the Crown, they further allege that in any case the securities are exempt from either capture or detention as being "postal correspondence" within the meaning of the eleventh Hague Convention, art. 1. There are some minor matters in respect

(1) [1917] P. 43.

(2) (1782) 2 Doug. 612n.

(3) (1819) 2 B. & Al. 258.

J. C.
1920
THE
NOORDAM.

of which an appeal is also brought, but as to these their Lordships, having examined the facts, think it sufficient to say that they see no reason to differ from the conclusion of the learned President. The questions above mentioned are those which alone require detailed consideration.

No doubt these securities were documents found in the mail bags of the mail steamers in question, but it cannot be contended that everything found in a mail bag at sea and carried at postal rates or franked by postage stamps is ipso facto "postal correspondence" for the purpose of the Convention. These documents, though printed and engraved matter, are not vehicles of information, and the value of their contents does not lie in what they tell the reader. On the contrary, expressed in common form and earmarked by serial letters and numbers or otherwise, they are identical records of proprietary rights in certain loans and shares or in the interest payable thereon, and, by their terms or by mercantile usage applicable to them, are transferable by delivery. To a bona fide buyer the document represents the holder's right to a portion of the loan or the share capital, as the case may be. They are commonly dealt in; they are a convenient form in which to transfer wealth from one country to another, and they require no separate assignment nor the execution of any instrument of transfer. If, therefore, any incorporeal rights can be assimilated to goods and merchandize, they must be such rights as these documents represent. If any document can stand outside the description "postal correspondence," it must be such a document as these. The occasion is not opportune for an attempt to define the word "correspondence" as used in the Convention, but their Lordships are satisfied that none of these securities come within it. Whether in the circumstances of this case the eleventh Hague Convention has any application at all is a question which accordingly need not be pursued.

At first sight the word "goods" might seem to be an equally inappropriate description. It must, however, be observed that the word is of very general and quite indefinite import, and primarily derives its meaning from the context in which

it is used. Their Lordships were referred to sundry statutes, in which the word is either defined or stated to include specified things. Of the latter kind the Naval Prize Act, 1864, was particularly relied on, for it brings within the term "goods" "all things subject to adjudication as prize." This does not advance matters. When, as in that Act, a word is extended by statute to include a named thing, the conclusion naturally is that in its ordinary sense the bare word would have been insufficient to include it. There is further no reason why the definition clause of the Naval Prize Act, 1864, should be treated as explanatory of the language of an Order in Council which makes no reference to it.

Their Lordships are of opinion that the cardinal consideration in interpreting the Order in Council is the character and scope of the Order itself. The content of the word "goods" differs greatly according to the context in which it is found and the instrument in which it occurs. In a will or in a policy of marine insurance, in the marriage service or in a schedule of railway rates, in the title of a probate action or in an enactment relating to the rights of an execution creditor, the word may sometimes be of the narrowest and sometimes of the widest scope. The question is what is its content here.

This Order was made for the purpose of further restricting the commerce of Germany, and the retaliation, which this Order gives effect to, finds its unquestionable justification in the avowed policy of Germany to prevent crews, passengers or goods being intrusted to British or Allied ships. That policy was intended to be, and was in fact, carried into effect by sinking ships with all that they contained. The "goods," upon which the Order operates by way of retaliation for such outrages are things which instead of being destroyed are to be adjudicated upon, and condemned or detained as the case may be. They are things such as can be loaded on board a ship and discharged from it, placed in the custody of the marshal of the Prize Court, requisitioned or detained, sold or released. They are such as, having been enemy property, may become neutral property at a definable date. The Order contains no definition of the word. Its general object is

J. C.
1920
THE
NOORDAM.

J. C.
1920
THE
NOORDAM.

recited as being "to prevent commodities of any kind from reaching or leaving Germany." How should the word "goods" be construed in such a context?

If securities such as these are not covered by the word "goods," it is plain that the Order as a means of carrying out its declared policy contains a large and lamentable lacuna; not that this is a reason for supplying its defects by doing violence to its language, but that the language may be legitimately interpreted with reference to the general scope of the Order. Of the several things which under the terms of the Order can be predicated of the "goods" to which it refers, no one can be said to be inapplicable to these securities. Their Lordships are of opinion that the scope of this Order is correlative to the enemy policy which it was intended to defeat. In a British ship these securities were liable to be sunk by enemy action in the name of legitimate warfare; nothing but the clearest defect in the wording of the Order should compel the conclusion that they were not also liable, when carried on neutral ships, to be brought before a Court of Prize to be dealt with after trial in accordance with the terms of the Order. "Goods" are not limited to things which are of considerable bulk or weight, though indeed these securities were anything but imponderable. The documents were not mere symbols of a right or title to be transferred by the operation of other instruments. If lost, they could not be proved and given effect to by secondary evidence. They themselves were things of price, the subjects of sale and delivery, irreplaceable and unalterable. No doubt can be entertained that they are within the descriptive word "goods" as used in the Order.

Next, when these securities were seized it is plain that in fact they all belonged to neutrals. The appellant contends that they ought to be deemed to be enemy property because by the law of nations belligerent rights are not to be defeated by changes of ownership, while goods are in transit. If the securities have been in Germany since the date of the Order, it is said that enemy ownership ought to be presumed, and that no transfer can be effective from the moment of their dispatch

from somewhere in Germany until their arrival at an ultimate destination in the United States. In order to apply the old rule of prize law to the present circumstances the argument must assume that transit is not confined to sea transit or to transit in the vessel actually seized, but extends to anterior land transit, even through Germany into Holland or through Holland to the Dutch port of departure, before the securities reach the mail steamer. It assumes the inversion of the doctrine of continuous voyage by applying this doctrine to transit away from Germany; it assumes its application to a transit in separate and discontinuous stages, and to articles which are not contraband at all; it assumes that the valid and complete transfer of property by delivery of the documents at the intermediate stages may be disregarded for the present purposes. Their Lordships are not to be understood to accept these assumptions as legitimate, or to express any opinion upon them; nor do they hold that the facts in the present case establish a "continuous transit" from Germany to America, in progress at the time of the seizure, in the sense in which that expression is used by the appellant in this part of the argument. They think that it is not necessary to investigate these assumptions on the present occasion. There is, in any case, a broad ground on which the whole of the appellant's argument on this point fails.

The Order in Council is a reprisals Order—that is to say, His Majesty, in the exercise of his belligerent right, has been pleased upon just and adequate provocation to resort to measures not prescribed by the general existing rules of the law of nations. These measures are of his own selection, and are defined in such manner as he thought fit to adopt in the terms of the Order. It is just because neutrals are required to submit to an Order, validly and justly made by way of reprisal, that they must also be held entitled to know from the terms of the Order itself what is the extent and limit of their liability under it. If clear terms are used, their clear meaning must be enforced; if ambiguous terms are used, the belligerent cannot ask to have them extended by construction in his own favour. It rested with those who framed the Order,

J. C.
1920
THE
NOORDAM.

J. C.
1920
THE
NOORDAM.

within the limits of the Crown's right of reprisal, to select and to state the extent of its exercise. It is the duty of a Court of Prize, administering the law of nations, to protect the rights of neutrals in this matter by limiting their obligation to that which the Order itself states, no less than to enforce the obligations which the Order duly creates and clearly declares. In the present case, in order to deter neutrals from assisting the enemy by engaging in his commerce, the Order tells them that their goods, if of German origin, are exposed to detention, and, by declaring that condemnation applies to enemy property, it tells them also that, so far as the Order is concerned, what belongs to them will not be condemned, though it may be detained. The words are precise. There is nothing said of "enemy character," nothing added to the words "enemy property" to make them applicable to a date antecedent to that of the diversion, nothing to show that the words are to be deemed to include something to which otherwise they would not extend. How can their Lordships be asked, under the name of construing the plain and simple language of the Order, to declare that it condemns neutral property which has been validly acquired from Germans within a certain time and under certain circumstances, and this not by force of the Order itself, but by an appeal to general rules whose inadequacy made it necessary to bring the special provisions of the Order into existence to meet the enemy's provocation? It is not enough that the second proviso to art. 4 contemplates the release of neutral property. This is to be done only on the application of the proper officer of the Crown, and is discretionary; nor, in any case, is the argument valid that, if a misconstruction of the language leads to hardship, the hardship can be redressed by the action of the executive. Their Lordships are unable to accept the argument of the Procurator-General on this point.

There remains the question of enemy origin. Origin is a quality of the goods, not of the owners or of their intentions or dealings. To decide where a chattel originates may often be difficult; in the case of things of great durability, often impossible. Origin sometimes refers to the place where raw

material was produced, but ex hypothesi the reprisals Order goes beyond the general rules applicable to the produce of enemy soil, since existing rules were found inadequate. Origin means sometimes the place of manufacture of an artificial commodity, and sometimes it is a thing undiscoverable. It is not inconsistent with the enemy origin of goods, which come from Germany, that they have previously come into being elsewhere than in Germany. After a certain lapse of time, or certain changes of circumstances, origin may be of little more than curious or antiquarian interest. This Order could not be concerned, for example, with old German machinery or old German books or old German wine imported into Holland many years ago. For present purposes there is no utility in applying to "goods" ideas appropriate only to human beings, such as the effect of an individual's place of birth or race or nationality upon his subsequent rights or obligations.

The best guide is the language and context of the Order itself, and the purpose which it was intended to serve. In substance art. 3 and art. 4 of the Order are to the same effect, an inwards movement being dealt with in the one and an outwards movement in the other. The words "of enemy origin" in the latter must correspond to "with an enemy destination" in the former; certainly no other words do. Neither expression makes any reference to the completion of some one mercantile or financial adventure or transaction; neither is limited in any way to goods which start from, or are bound to, an enemy port. One of the purposes of the Order is to prevent commodities of any kind from leaving Germany; as regards certain commodities—namely, such as are of enemy origin but are not enemy property—the means of prevention is diversion, discharge and detention till the conclusion of peace. To "origin" in such a connection neither the place where the securities were printed or signed or sealed is really material, nor the country in which the undertakings or the debtors from whom the securities emanate, chance to carry on their affairs.

As to the securities with which this appeal is concerned, in

J. C.
1920
THE
NOORDAM.
—

some cases they were bought in Germany for American buyers and received and forwarded to the buyers by their Dutch agents; in some they were bought in Germany by Dutch dealers for the purpose of prompt resale or of delivery under sales already made in the United States. It is clear as a common characteristic that no long time before they were diverted all had formed part of the common financial stock of Germany's holding in foreign securities. What happened was that as part of the liquidation of this stock, either to support foreign exchange or to establish foreign credits or otherwise, these securities, no doubt along with many others, were separated from that common stock and dispatched from a terminus a quo in Germany to a terminus ad quem overseas. Only in two cases, and those cases of collection of interest coupons, is that terminus elsewhere than in the United States, where doubtless a free market was to be found. There they became merged in the general mass of American-owned securities. In a word these securities were part of Germany's resources, and the subject-matter of these dispatches had its source in Germany. Their origin does not depend on subsequent and intermediate dealings. That the transfer from the place of their origin to their new resting-place was effected by bona fide transfers in the ordinary course of financial business and physically by a series of transportations in various vehicles, not necessarily predetermined from the outset, is material to the question of enemy property but not to that of enemy origin. If it were otherwise the whole Order could be made nugatory as to all classes of goods if care were taken in each case to sell to a neutral buyer and to deliver in Germany and to leave the buyer to do the rest. Their Lordships are of opinion that the meaning of "enemy origin" in the Order is abundantly clear, and satisfies all that a neutral is entitled to require of the language of a Reprisals Order.

Under the terms of art. 4 the following parcels were of enemy origin, and as such were liable to detention. [The judgment set out eleven parcels of bonds and coupons which had been bought in Germany as stated above.]. In No. 190 the claimants' affidavit admits the purchase of the coupons in

Germany, and gives no explanation of the accompanying bond, which therefore their Lordships do not propose to separate from the coupons. The mere fact that bonds bear a German revenue stamp, apparently because they were at some time issued in Germany, does not seem to them sufficient to prove origin, where there is no evidence as to the character of the sellers. There are other cases as to which the facts are insufficient, either by way of proof or of presumption, to establish such a connection with Germany as would bring them within the term "enemy origin," but it is not necessary to discuss these cases in detail.

Their Lordships, therefore, think that the judgment of Lord Sterndale, which was otherwise correct, should be varied by setting aside the decrees for the release of the securities, numbered and described as above, and by substituting the order for their detention, till it be otherwise ordered, which he should have made. It is not necessary to decide what constitutes "the conclusion of peace," mentioned in the first proviso to art. 4, for the objects of the Order in Council have now been satisfied, and there is no further reason why the proper officer of the Crown should not forthwith apply to the Prize Court for the release of the securities to the respondents. The very limited success of his appeal does not entitle the appellant to any order as to costs, which will therefore be borne by the respective parties. Their Lordships will humbly advise His Majesty accordingly.

J. C.
1920
THE
NOORDAM.

Solicitor for appellant : *Treasury Solicitor.*

Solicitors for respondents : *Travers Smith, Braithwaite & Co. ; Parker, Garrett & Co. ; Waltons & Co.*

H. L. (Sc.)*

[HOUSE OF LORDS.]

1920
May 11.

COLTNESS IRON COMPANY, LIMITED. APPELLANTS;

AND

DOBBIE RESPONDENT.

*Mines—Coal Mines—Wages—Payment by Weight of Mineral—Deductions
 —Mineral contracted to be gotten—Coal Mines Regulation Act, 1887
 (50 & 51 Vict. c. 58), s. 12, sub-s. 1.*

By s. 12, sub-s. 1, of the Coal Mines Regulation Act, 1887: “where the amount of wages paid to any persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed. . . .”

“Provided that nothing in this section shall preclude the owner agent or manager of the mine from agreeing with the persons employed in the mine that deductions shall be made in respect of stone or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten; “such deductions being determined (a) in such special mode as may be agreed upon between the owner agent or manager and the employees, or (b) by some other person appointed in that behalf by the owner, agent or manager, or (c) (if any checkweigher is stationed for that purpose at the proper place) by such person and such checkweigher, or in case of difference by a third person to be mutually agreed upon by the owner agent or manager and the employees or in default of agreement pointed as therein mentioned.

A miner who was paid by weight, and who worked in a seam in which coal was mixed with stones and dirt, sued the mineowners for a sum for unpaid wages representing the aggregate amount of deductions made for stones and dirt from the hutches sent up by him during a specified period, upon the ground that such deductions were illegal. It was a term of the pursuer's employment that he should be paid for clean coal only. The weigher appointed by the mineowner made a deduction for stones and dirt of a fixed amount per hutch based upon an average arrived at by crow-picking sample hutches and deducting from the gross weight the weight of the stones and dirt therein contained, and this amount was well within the average weight of stones and dirt found in the hutches. The miners agreed with the mineowners that deductions should be made in accordance with s. 12 of the Coal Mines Regulation Act, 1887, but no special mode of determining the deductions was agreed upon. A checkweigher appointed by the miners objected to the system of averages adopted

* *Present*: VISCOUNT FINLAY, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and LORD MOULTON.

by the weigher and claimed that the amount of the deductions should be ascertained by crow-picking each hutch separately (which was admittedly impracticable), but the weigher continued his former practice :—

Held, that the deductions had not been determined in the manner prescribed by the section; but that by the terms of the section the pursuer was entitled to payment in respect only of “the mineral contracted to be gotten”—namely, coal—and that he had failed to establish his claim.

Netherseal Colliery Co. v. Bourne (1889) 14 App. Cas. 228 distinguished. Interlocutor of the Second Division of the Court of Session in Scotland, 1919 S. C. 257, reversed.

H. L. (Sc.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland. (1)

The respondent was and had been since July 7, 1913, a miner in the employment of the appellants at their Blairhall Colliery in the county of Fife. His wages were dependent on the weight of mineral gotten by him and it was a term of his employment that deductions should be made from the mineral sent up the pit by him in respect of stones and substances other than the mineral contracted to be gotten.

In March, 1916, the respondent raised an action in the Sheriff's Court against the appellants for the purpose of determining the legality of certain deductions made by the appellants from his wages, and the parties agreed to treat the action as a test case. The question depended upon the construction of s. 12 of the Coal Mines Regulation Act, 1887. (2) The facts which led up to the action were as follows :—

(1) 1919 S. C. 257.

(2) Coal Mines Regulation Act, 1887, s. 12, sub-s. 1: “Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them, those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable.

“Provided that nothing in this section shall preclude the owner agent or manager of the mine from

agreeing with the persons employed in the mine that deductions shall be made in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten, or in respect of any tubs, baskets, or hutches being improperly filled in those cases where they are filled by the getter of the mineral or his drawer, or by the person immediately employed by him; such deductions being determined in such special mode as may be agreed upon between the owner agent or manager

H. L. (SC.)
 1920
 COLTNESS
 IRON
 COMPANY
 v.
 DOBBIE.

The Blairhall Colliery comprised five seams. In four of these seams, including the seam in which the respondent worked, a considerable portion of the contents of the hutches always consisted of substances other than coal. Prior to November, 1914, the weight of coal gotten by the miners had been determined by a weigher alone. The method by which he proceeded was to have eight or nine hutches crow-picked per day and to deduct from the gross weight of the hutch a figure based upon the average result of the crow-picking. From a hutch of ten hundredweight he deducted half a hundredweight. The deductions so made were checked every month by the appellants and it was always found that the total weight of coal returned by the weigher as gotten by the miners exceeded the total output of the colliery, so that the miners were in fact paid for a larger quantity of coal than had actually been gotten by them. The weigher continued this mode of procedure after the appointment of a checkweigher by the men as hereinafter mentioned. In November, 1914, owing to dissatisfaction among the miners at the way in which the coal won by them was being weighed, a checkweigher named Tuke was appointed by the miners' union. Tuke objected to the method of averages adopted by the weigher and took up the position that in the absence of a special agreement between the owners and the men all deductions were illegal. On March 4, 1915, after a lengthy correspondence, the miners agreed that the weigher and checkweigher should decide what deductions (if any) should be made for foreign material in the hutches in accordance with s. 12 of the Act of 1887. Tuke, however, refused to allow any deductions except for hutches which were actually crow-picked, and he accordingly took no part in checking the amount

of the mine on the one hand, and the persons employed in the mine on the other, or by some person appointed in that behalf by the owner agent or manager, or (if any checkweigher is stationed for this purpose as hereinafter mentioned) by such person and such checkweigher, or in case of difference by

a third person to be mutually agreed on by the owner agent or manager of the mine on the one hand, and the persons employed in the mine on the other, or in default of agreement appointed by a chairman of a Court of quarter sessions within the jurisdiction of which any shaft of the mine is situate."

of the deductions made by the weigher. It was conceded that the crow-picking of every hutch was impracticable and would involve the stopping of the colliery. In these circumstances the appellants proposed that a third person should be appointed as arbitrator but the men did not agree to this and nothing further was done in the matter until the issue of the writ in this action.

H. L. (Sc.)
1920
COLTNESS
IRON
COMPANY
v
DOBBIE.

In the form which it ultimately assumed the action was one for payment by the appellants to the respondent of the sum of 6*l.* 17*s.* 2*d.*, being the aggregate amount of the deductions made from the respondent's wages between January 11, 1915, and March 6, 1916. After various proceedings a new record was substituted for the old one and the cause became virtually a Court of Sessions action. A proof was allowed and it was taken before Lord Salvesen, who reported it to the Second Division.

The Second Division, by a majority (the Lord Justice-Clerk, Lord Dundas and Lord Guthrie; Lord Salvesen dissenting), decerned against the appellants for payment of the sum concluded for by the writ as amended, upon the ground that the deductions, not having been made in the manner prescribed by the Act, were illegal.

1920. March 18, 19. *Sir John Simon K.C.* and *Alexander Moncrieff K.C.* (of the Scottish Bar), with them *Walter T. Watson* (of the Scottish Bar), for the appellants. The question turns upon the construction of s. 12 of the Coal Mines Regulation Act, 1887, which replaced s. 17 of the Coal Mines Regulation Act, 1872. Both sections prescribe the mode of payment of miners where the amount of wages depends on the amount of mineral gotten, but the language of the two sections is materially different. Sect. 17 of the Act of 1872 provides that the miners are to be paid "according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly," subject to a proviso which allowed deductions to be made by agreement for stones and other foreign matter. Sect. 12 of the Act of 1887 provides that the miners are to be paid

H. L. (Sc.) “according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near the pit mouth as is reasonably practicable,” and the proviso as to deductions is also materially different. The substitution of “the mineral contracted to be gotten” for “the mineral gotten” was intentional and it has an important bearing on this case. The amendment in the Act of 1887 was said to be due to the decision of the Divisional Court in *Bourne v. Netherseal Colliery Co.* (1) under the Act of 1872, where it was held that the deductions there claimed were illegal, as not having been determined in the manner provided by the statute. That decision was subsequently affirmed first by the Court of Appeal and ultimately by this House, but on different grounds. The actual decision of this House was that slack was coal and was to be paid for, but it has been contended that, according to the interpretation of the Act adopted by the House, unless the proviso was invoked the miner was entitled to be paid on the total contents of the tub. That decision, however, has no application to the Act of 1887. Here by the terms of his employment the miner is to be paid for clean coal only and a decision that he is to be paid by gross weight must be wrong. By the proviso to s. 12 the deductions are to be determined (1.) in such special mode as may be agreed upon between the masters and the men; (2.) by the weigher appointed by the masters; or (3.) where there is a checkweigher by the weigher and checkweigher, or in case of difference by a third person to be mutually agreed on, or in default of agreement appointed by the chairman of quarter sessions. By the interpretation clause, in the application of the Act to Scotland the chairman of quarter sessions was the sheriff. Unfortunately that definition was repealed per incuriam by the Coal Mines Regulation Act, 1911; but it is assumed that the Court would be able to devise machinery for carrying the section into effect, if required. It is said against the mineowner that the substitution of average deductions for individual weighing is a special mode, which requires an

(1) (1887) 19 Q. B. D. 357; (1888) 20 Q. B. D. 606; 14 App. Cas. 228.

agreement between the master and men, but it is submitted that the use of averages is not a special mode within the meaning of the proviso, but is a method to which recourse can be had by the weigher alone or where there is a checkweigher by the weigher and checkweigher together. The checkweigher, having repudiated his function of determining the deductions, no difference has arisen within the meaning of the proviso. There was no operation by the checkweigher under the proviso at all. He did not attempt to determine the amount of the deductions but objected to the principle of deductions altogether. He must therefore be treated as absent. The respondent has neither proved nor averred that he has not been paid for the whole amount of coal which he got and his action therefore fails. [They also referred to *Ronaldson v. Mowat* (1) and *Atkinson v. Hastie*. (2)]

H. L (Sc.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
—

Constable K.C. and *Hon. William Watson K.C.* (with them *Macquisten K.C.*) (all of the Scottish Bar) for the respondent. The statute means that, failing agreement, the owner must pay on the rough. It imposes on the owner the double duty of weighing the rough and weighing the clean coal, and he can only relieve himself of that duty by taking advantage of the proviso. The construction of the Act of 1872 was fully considered by the Court of Appeal and by this House in the *Netherseal Case* (3) and the propositions there laid down have been applied to the Act of 1887. Those propositions are (1.) that the Act of 1872 interfered with the freedom of contract between masters and men; (2.) that it imposed on the owner the duty to weigh and to pay on the weight so ascertained, whatever it was; (3.) that any deductions to be allowed must be of the kind and ascertained in the manner prescribed by the statute; and (4.) that the owner was placed under an unqualified obligation to justify his deductions to the men. Equally, the Act of 1887 creates a duty to weigh and to pay accordingly. If coal only is to be paid for the owner must go through a double weighing, otherwise he must pay on the rough unless he can avail himself of the proviso.

(1) (1894) 21 R. (J.) 55.

(2) (1894) 21 R. (J.) 62.

(3) 20 Q. B. D. 606, 610, 611;
14 App. Cas. 228, 234, 237, 243, 244.

H. L. (Sc.) 1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.

The respondent relies upon the tremendous difference between the propositions laid down in the *Netherseal Case* (1) and the construction put forward by the appellants in the present case and submits whether it is possible to extract from the statute any means short of agreement of ascertaining the mineral contracted to be gotten on which the men are to be paid. The point on which the House is now asked to decide was not argued in the Court below and was not raised on the pleadings.

[*Sir John Simon K.C.* The appellants would be quite content with dismissal and not absolutor, so that the point may be tried again by another miner.]

In *Brace v. Abercarn Colliery Co.* (2) where the same point arose as in the *Netherseal Case*, except that the case occurred under the Act of 1887, the Court considered whether any difference arose by reason of the words "mineral contracted to be gotten" and came to the conclusion that those words left the matter precisely as it stood before. Those words occurred in the proviso to s. 17 of the Act of 1872 as well as in the proviso to s. 12 of the Act of 1887, and the explanation of the Court was that they were inserted by the draftsman in the substantive part of s. 12 for the sake of uniformity. In *Kearney v. Whitehaven Colliery Co.* (3) this provision is again discussed and Lord Esher's judgment shows that the *Netherseal Case* is still applicable and that the only way in which the owner can escape paying on the gross contents of the tub is by relying on the proviso. On the question whether the checkweigher was reasonable in taking the view which he did of his duties it is submitted that the proviso did not mean to confer on a checkweigher, whose duties are strictly limited, the right to settle a rate of payment applicable to every individual in the pit and based upon average testing. This was a special mode within the meaning of the proviso and was not agreed to by the persons employed in the mine.

Sir John Simon K.C. replied.

(1) 20 Q. B. D. 606, 610, 611; (2) [1891] 1 Q. B. 496, 502; [1891] 14 App. Cas. 228, 234, 237, 243, 244. 2 Q. B. 699, 705.

(3) [1893] 1 Q. B. 700.

Claud Mullins held a watching brief on behalf of the Coal H. L. (Sc. Association).

The House took time for consideration.

1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
—

May 11, 1920. VISCOUNT FINLAY. My Lords, this case raises an important question with reference to the ascertainment under s. 12 of the Coal Mines Regulation Act, 1887, of the amount on which the miner is entitled to be paid. The respondent is a miner in the employment of the appellant company at their Blairhall Colliery in Fife. He was employed to win coal, his wages being dependent on the weight of mineral gotten by him, and he brought this action to recover *6l. 17s. 2d.* alleged to have been improperly deducted by the appellants. It is common ground that a term of his service was that deduction should be made from the gross weight of the mineral sent up the pit by the pursuer in respect of stones or substances other than the mineral contracted to be gotten, and that this deduction should be ascertained as provided by s. 12 of the Act of 1887 (Condescendence 3). No special mode of ascertaining the deductions had been agreed upon between the owners of the colliery and the miners. The checkweigher appointed on behalf of the men contended that the amount of deduction for "dirt" must be arrived at by actual weighing in the case of each hutch, and that failing ascertainment in this way the miner must be paid on the gross weight sent up, including stones and material other than coal. On the other hand, the banksman or weigher as representing the company contended that the deduction should be ascertained by calculation of the average amount of "dirt." No agreement was arrived at and the action was brought to recover the balance which the company had refused to pay on the ground that it represented the "dirt" which had been brought up along with the coal.

The case must turn upon the interpretation to be put upon the provisions of s. 12, sub-s. 1, of the Act of 1887. This sub-section is still in force, as it occurs in one of the sections exempted from the repeal of the rest of the Act of 1887 by

H. L. (Sc.) 1920 the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50, s. 126, and Fourth Schedule). [His Lordship read the sub-section.]

COLTNESS IRON COMPANY v. DOBBIE.
 Viscount Finlay.

It is to be observed that in virtue of the first paragraph of this sub-section the miners are to be paid "according to the actual weight gotten by them of the mineral contracted to be gotten," and "the mineral gotten by them" is to be weighed at a place as near to the pit mouth as is reasonably practicable. The provision of the Act of 1872, s. 17, had been that the miners were to be paid "according to the weight of the mineral gotten by them, and such mineral shall be truly weighed accordingly," and then followed the proviso with regard to deduction of stones, etc., by agreement. The change from payment on "the weight of the mineral gotten by them" in the 1872 Act to payment on the "actual weight gotten by them of the mineral contracted to be gotten" is marked, and cannot have been accidental. It denotes that under the Act of 1887 payment is to be made on the amount of coal if that be the mineral contracted to be gotten, and for that purpose it is necessary that in some way the amount of coal as distinguished from stones and other material brought up with it should be ascertained. This seems to me to be clear on the words of the Act, and indeed it was admitted by counsel for the respondent that the mineral contracted to be gotten must denote coal apart from stones and other extraneous material. On the other hand, the provision for the compulsory weighing is in different terms. What is to be weighed is "the mineral gotten by them," not "the weight gotten by them of the mineral contracted to be gotten." I agree with what was said by Lord Adam, differing on this point from the other judges in *Atkinson v. Hastie* (1): "The Act takes a very sharp distinction between the minerals gotten by the miner and the minerals contracted to be gotten. The duty imposed upon the owner is to truly weigh the former—that is, the whole contents of the hutch—and not the latter, which is the coal." To weigh the coal would involve a separation from it of the stone and other extraneous material. Such separation would be a troublesome and lengthy process,

and it is not disputed that if it were pursued the working of the colliery would be brought to a standstill. This accounts for the fact that in s. 12, sub-s. 1, while payment is to be on the mineral contracted to be gotten, what is to be weighed is the mineral gotten, which will include stones, etc., as well as coal.

H. L. (Sc.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Viscount Finlay.

It is of course necessary that to ascertain the amount due to the miner the proper deduction should be ascertained. There is no compulsory provision for this purpose in the Act; it is left to agreement, but it is manifest that both parties have the strongest reason for agreeing for the making of such deduction. Until the deductions have been made the amount on which the miner is entitled to be paid has not been ascertained, inasmuch as the section provides he is to be paid according to the coal he has gotten. The provision for ascertaining the deductions is in form permissive, but when its terms are rightly understood there appears to me to be no difficulty in its working. This provision in the Act of 1887 takes the form of a proviso, as in the Act of 1872, from which it has, to a great extent, been taken. The most material portion is in effect as follows: Provided that nothing in this section shall preclude the owner from agreeing with the persons employed in the mine that deductions shall be made in respect of stone or substances other than the mineral contracted to be gotten sent out with the mineral contracted to be gotten. It was natural enough to put this in the form of a proviso in the Act of 1872 under which the miners were to be paid "according to the weight of the mineral gotten by them." It would not naturally be put in the form of a proviso in the Act of 1887 where the antecedent enactment was that the miners were to be paid "according to the weight gotten by them of the mineral contracted to be gotten," as this involves the necessity of ascertaining the net amount. The form adopted is really a survival from the Act of 1872, and it may have been some sense of its incongruity in the new Act which led the draftsman to substitute the word "provided" simply for the words "provided always" in the 1872 Act. The proviso in the Act of 1887 is really a

H. L. (Sc.) substantive enactment in a permissive form for determining the deductions which the terms of the earlier part of the section show must be made. After providing that agreement for deductions may be made, this proviso goes on to define the methods by which such deductions are determined. The first method is by agreement on some special mode "such deductions being determined in such special mode as may be agreed upon between the owner agent or manager of the mines on the one hand, and the persons employed in the mine on the other." These words mean merely that the owners and the miners may agree on any particular method of determining the deductions, and that if such an agreement has been arrived at the method so agreed on shall be pursued so long as the agreement remains in force. The words do not mean, as has been supposed, that any methods which can be labelled as "special modes" can be adopted only if there has been an agreement for them between the owners and the miners. It is always open to those who, under the latter part of the sub-section, are entrusted with the determination to adopt any method whatever of ascertaining the true amount unless their hands are tied by the agreement of the owners and miners that a particular method must be pursued. Any special mode means merely any particular mode which the parties may have agreed on. No methods can be defined as special in themselves, and to read the clause as prohibiting the weigher and checkweigher from adopting on their own motion certain methods which may be considered special would be to render their task impossible. No one could say whether they had selected a method which was not open to the disqualification of being "special."

In the present case there was no agreement between owners and miners for any special mode. The matter was therefore left at large for the determination of the person appointed in that behalf by the owners (the banksman or weigher) together with the checkweigher who had been appointed by the men. The person so appointed by the owners proposed to determine the deductions by applying a system of averages based on the proportion of dirt which had been found in other

cases. The checkweigher refused to be a party to any mode of determination except by actual weighing of each hutch, which would have involved the separation by crow-picking from the coal of the stones and other extraneous materials. It was admitted that this would have meant the stoppage of the mine owing to the time which the process would take and the consequent accumulation of trucks. It appears to me that in these circumstances there was a "difference" within the meaning of the concluding part of the sub-section, and that the matter would fall to be determined by a third person to be agreed on by the parties. There was no mutual agreement on such third person, and according to the sub-section he was in that case to be appointed by a chairman of a Court of quarter sessions. Sect. 76 of the Act of 1887 provided that in Scotland such appointment should be made by the sheriff instead of the chairman of quarter sessions. This section, however, has been repealed by the Act of 1911, so that there might be some difficulty in applying this provision in Scotland. It has been suggested that this difficulty might be met by invoking the nobile officium of the Court of Session, but for the purposes of the present case it is not necessary to determine this point. As I have stated, the miner brought this action to recover the balance which would be due to him on the gross weight of the coal and other materials in the hutch. The case was sent to proof after there had been some debate on the amended record. The proof was taken before Lord Salvesen and in his judgment, at pp. 262 and 263 of the Appendix, there is given a summary of the facts. Omitting the fourth and sixth findings, to which the respondent's counsel took exception at the Bar of your Lordships' House, this summary is as follows: "The important facts are as follows:—

- (1.) That the attitude taken up by the checkweigher, Tuke, from the first was that he could agree to no deduction unless in the case of a particular hutch that was crow-picked.
- (2.) That he was instructed to maintain, and did maintain, this attitude by the miners' Union, of which he was an official.
- (3.) That the cost of crow-picking every hutch in order to ascertain the amount of dirt in it is prohibitive, and such

H. L. (Sc.)
 1920
 COLTNESS
 IRON
 COMPANY
 v.
 DOBBIE.
 Viscount Finlay.

H. L. (Sc.) 1920
 COLTNESS
 IRON
 COMPANY
 v.
 DOBBIE.
 Viscount Finlay

crow-picking is impracticable, as it would involve the stoppage of working in the seam in question. (4.) (5.) That the defenders' deduction of half a hundredweight per hutch was on an average far below the amount of dirt immixed with the coal which the pursuer and his fellow miners sent to the surface. (6.) (7.) That no method of estimating the dirt in the hutches of coal sent up from a particular seam has been suggested except by systematic crow-picking of sample hutches and collating the results. (8.) That this method was in fact followed by the weigher, and that the checkweigher was invited to co-operate with him, but refused to do so. And (9.) that the checkweigher and those instructing him refused to agree to the appointment of an arbiter as provided for by the Act." The accuracy of the ninth finding was also challenged by the respondent's counsel, but the counsel for the appellants maintained that it was correct and a reference to the letters and evidence cited by him appears to me to establish its substantial accuracy. Lord Salvesen's summary of the facts as given above appears to contain substantially what is necessary for the decision of the case so far as facts are concerned. A great many authorities were referred to during the argument. The case of the *Netherseal Colliery* (1) arose under the Act of 1872. In that case the owners claimed to deduct the slack or small coal from the amount of coal on which they were to pay in pursuance of their contract with the miners to this effect. It was held that this deduction was illegal, as by the terms of the Act miners must be paid according to the weight of the mineral gotten, and as the slack was coal, though small coal, it was not by the statute permissible to contract for this deduction. None of the judgments throw much light upon the points in the Act of 1887 which now fall to be decided. In *Brace v. Abercarn Colliery Co.* (2) the decision in the *Netherseal Case* (1) was followed in a case arising under the 1887 Act. The decision of the Divisional Court was

(1) (Div. Ct.) 19 Q. B. D. 357; (2) [1891] 1 Q. B. 496; [1891] (C. A.) 20 Q. B. D. 606; (H. L.) 2 Q. B. 699.
 14 App. Cas. 228.

affirmed by the Court of Appeal, where it was held that the small coal was part of "the mineral contracted to be gotten" within the meaning of the Act of 1887, and that the variation in the wording as compared with that of the 1872 Act was for that purpose immaterial. In the case of *Kearney v. Whitehaven Colliery Co.* (1) the arrangement was that one tub out of twenty should be selected, and if it were found to contain more than a certain amount of dirt the man who sent it up was to be paid nothing for the coal, while the other nineteen were paid in full on the total weight of the contents of each tub as if it contained coal only. It was held that such an arrangement was not a method of ascertaining the deduction within the terms of the Act. The correctness of this decision is not in question in the present case, but some of the dicta as to the meaning of particular words in the 1887 Act may be open to question. This case falls really to be decided on the words of the statute, and previous decisions give little or no assistance.

H. L. (Sc.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Viscount Finlay.

The majority of the Second Division, the Lord Justice-Clerk, Lord Dundas and Lord Guthrie concur in thinking that the pursuer was entitled to judgment for the 6*l.* 17*s.* 2*d.* claimed. Lord Salvesen dissented. The Lord Justice-Clerk said that he did not think it necessary to consider the main enacting part of s. 12. But it appears to me that it is vital to ascertain what is the true meaning of the words which define the right to payment. If they mean that the miner is to be paid according to the amount of coal gotten by him, it is impossible to sustain an interlocutor which gives to a miner who has been paid, according to the evidence, the value of all the coal that he got an additional amount which must represent not coal but stones or other extraneous matter. The decision proceeds really on the view that if the deductions are not made in the manner prescribed by the statute the miner is entitled to be paid on the gross weight of what he has got, including stone, etc., and, as the clause provides that he is to be paid on the weight of the mineral contracted to be gotten—i.e., the coal—such a decision must be erroneous. Lord

(1) [1893] 1 Q. B. 700.

H. L. (Sc.) Dundas says that there had been no resort to any one of the three methods laid down in the section for determining the amount of deductions, that there had been no agreement between the owners and the miners as to any special mode, that as there was a checkweigher the weigher had no jurisdiction to decide except with his concurrence, that there had been no agreement between the weigher and the checkweigher, and that this made an end of the defenders' case. Lord Dundas added that a method based on averages could be validly adopted only by antecedent agreement between the owners and men as a special mode. Lord Guthrie held that the mode of taking an average deduction and thus avoiding the necessity of individual weighing is a special mode and was allowable only if the owners and men had so agreed. Lord Salvesen differed, and he points out in his judgment that the effect of the conclusion reached by his colleagues is that the statute provides no means of adjusting differences as to the amount of deductions, and so makes the provisions of s. 12 binding on the owners only : Appendix, p. 264 B.

1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Viscount Finlay.

The construction of s. 12 adopted by the majority in the Court of Session would make it utterly unworkable. If the determination of deductions on the basis of averages is a special mode which can be adopted only with the consent of both owners and men, and the checkweigher will agree to no method but that of weighing the coal in each hutch separate from the stones, no determination of deductions is possible. The result would be that the amount on which the miners are entitled to be paid cannot be ascertained except by a method which would stop the working of the colliery. In the interests of the men themselves the amount which they are entitled to be paid must be ascertained, and if it is not so ascertained they could not recover their wages. I can see no warrant for the view adopted in the Court below, that in such a case they are entitled to be paid on the whole contents of the hutch, including what is admittedly not coal.

In my opinion the interlocutor pronounced should be reversed and the action dismissed with costs here and below.

VISCOUNT CAVE. My Lords, in this case the respondent, a H. L. (Sc.) miner employed at the Blairhall Colliery in the county of Fife, sued his employers, the present appellants, for a sum of 6*l.* 17*s.* 2*d.*, which he alleged to be due to him for wages earned between January 11, 1915, and March 6, 1916. The pursuer's case was that he was employed to win coal, his wages being dependent on the weight of mineral gotten by him, and that the defenders had during the period mentioned made illegal deductions from the weight of the mineral sent up by him from the mine and had made corresponding deductions from the wages due to him; and the amount sued for was the aggregate amount of the deductions so made. The amount claimed is small; but this is a test case, and it is said that claims amounting to about 5000*l.* depend upon the decision.

1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
—

The decision must turn upon the construction and effect of the unrepealed sections of the Coal Mines Regulation Act, 1887, and particularly of s. 12, sub-s. 1, of that Act. The first paragraph of s. 12, sub-s. 1, provides that where (as in this case) the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them: "those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable." This enactment is compulsory and takes effect notwithstanding any agreement to the contrary; and any contravention of it is punishable as an offence against the Act. Upon this paragraph an important question of construction arises. Each hutch or tub of mineral sent out of a coal mine contains with the coal a certain amount of foreign matter, such as stones and dirt, the quantity varying with the seam which is being worked and the care exercised by the miner who fills the hutch. The question is whether the "mineral contracted to be gotten," upon the weight of which the miner is entitled under the section to be paid, means the gross contents of the hutch or those contents less the foreign matter, that is to say, the clean coal. In my opinion

H. L. (Sc.) the latter is the true meaning of the expression. It is plainly
 1920 used in this sense in the second paragraph of the sub-section,
 COLTNESS where it is contrasted with the stones or other substances
 IRON sent with it out of the mine; and there is no reason why
 COMPANY a different construction should be put upon it in the first
 v. paragraph. Further, there is a significant difference between
 DOBBIE. this section and the corresponding section (s. 17) of the Coal
 Viscount Cave. Mines Regulation Act, 1872; for whereas the earlier enactment
 prescribes payment according to the weight of the "mineral
 gotten," the later statute compels payment according to "the
 actual weight gotten by them of the mineral contracted to
 be gotten." It appears to me that the change of language
 is not due, as has been suggested in some cases, to a desire for
 uniformity on the part of the draftsman, but is intended to
 define and govern the meaning and effect of the section.
 In this respect I agree with the opinions expressed by Lord
 Wellwood in *Ronaldson v. Mowat* (1) and *Atkinson v. Hastie*. (2)

It is obvious that, if the first paragraph of s. 12, sub-s. 1,
 stood alone, the difficulty of complying with it would be very
 great and in some cases insuperable. In order to ascertain
 the actual weight of clean coal in any hutch it would be neces-
 sary either to empty the hutch and crow-pick the contents,
 or to devise some other means of ascertaining the weight of
 stones and dirt mixed with the coal. The time and money
 expended in this process would be very great, disputes would
 be likely to arise, and the payment of the miners' wages
 would be proportionately delayed. Accordingly there is
 added to the sub-section a second paragraph or proviso by
 which (if the parties choose to put it into operation) machinery
 is provided for ascertaining the actual weight of coal gotten.
 If this proviso is agreed to by employer and employee, then
 deductions are to be made from the matter "sent out of
 the mine" (that is to say, from the gross contents of the
 hutches) in respect of stones or substances other than coal;
 and these deductions are to be ascertained in one of three
 ways—i.e., either (a) in such special mode as may be agreed
 upon between the employer or his agent or manager and the

(1) 21 R. (J.) 55, 58.

(2) 21 R. (J.) 62, 66.

employee; or (b) by some person appointed in that behalf H. L. (Sc.)
 by the owner agent or manager; that is to say (speaking 1920
 generally) by the weigher or banksman; or (c) if a check COLTNESS
 weigher appointed by the employees' is stationed for this IRON
 purpose at the proper place, then by the weigher and check COMPANY
 weigher jointly, or, in case of difference, by a third person v.
 to be agreed on by the employer and employee, or in default DOBBIE.
 of agreement to be appointed by the chairman of quarter Viscount Cave.
 sessions. In the present case it was agreed between the
 employers and employees that deductions should be made in
 accordance with the proviso, but no "special mode" was
 agreed upon for ascertaining such deductions. A check
 weigher was appointed by the men, and I think it clear
 (though on this point a question was raised by the appellants)
 that he was duly "stationed for the purpose" of ascertaining
 the deductions. It follows that in this case the deductions
 fell to be ascertained by the method marked (c) in the above
 statement, that is to say, by the weigher and checkweigher
 jointly, or in case of difference by a third person to be chosen
 in the manner prescribed by the section.

Each of the hutches sent out of the Blairhall mine contained about half a ton of mineral; and it had for some time been the practice of the owners to deduct from the weight in each hutch sent out from the "five foot" seam (where the pursuer was employed) half a hundredweight in respect of stones and dirt, and to pay wages on the balance of the weight in the hutch. This figure of half a hundredweight was arrived at by crow-picking a certain number of sample hutches and ascertaining the average amount of stones and dirt in the hutches so dealt with, the result so obtained being checked by periodical crow-picking and otherwise. It is not disputed that the amount so deducted, sometimes referred to as the "standard deduction," was well within the average weight of stones and dirt found in the hutches, though no doubt some hutches contained more and some less than the average amount. At or about the beginning of the year 1915 the check weigher, acting on a resolution passed by a show of hands at a meeting of the employees, took objection to this standard deduction

H. L. (Sc.)
 1920
 COLTNESS
 IRON
 COMPANY
 v.
 DOBBIE.
 —
 Viscount Cave.

and claimed that every hutch should be separately crow-picked in order to ascertain the actual amount of clean coal which it contained. It is clear that at the Blairhall Colliery where the hutches were sent up in rapid succession—sometimes (as your Lordships were told) at the rate of three or four in a minute—such a procedure could not be adopted without stopping the mine. The checkweigher, Charles Tuke, in his cross-examination stated as follows: “If every hutch had been crow-picked the colliery would have been stopped. One reason for that is that after the first batch of hutches came up there would be no hutches available for filling; they would block up the whole place. The labour required also would have been prohibitive.” In those circumstances the weigher not unnaturally objected to the checkweigher’s proposal, and contended that the standard deduction should be continued. In so doing he was not, I think, proposing that this method should be agreed upon as a “special mode” of ascertaining the deductions within the meaning of the section. Such an agreement could no doubt have been made between the employers and employees, and indeed this was precisely the “special mode” which had been so agreed upon in the case of *Ronaldson v. Mowat* (1), and was there held to be lawful. But no such agreement could be made between the weigher and the checkweigher; and, obviously, what the weigher desired was that, having regard to the experiments made, a standard deduction of half a hundred-weight per hutch should be recognized as a fair allowance in estimating the actual weight of coal in each hutch. The checkweigher however, still acting on instructions, declined to give way and no agreement was arrived at between the two men.

It appears to me that at this point a “difference” had arisen which was capable of being referred to a “third person” as arbitrator in accordance with the statute. It has been suggested that there was no such “difference,” as the checkweigher was contending for a principle, and did not apply his mind to the question of amount; but I

(1) 21 R. (J.) 55.

think that the proper inference from this fact is not that there was no difference, but that the difference was fundamental. At all events, the employers proceeded on the footing that a difference had arisen, for they proposed, both orally and in writing, that a third person should be agreed upon in accordance with the section ; but the men refused to concur in any such appointment and the proposal dropped. No application for the appointment of a " third person " was made by either party to the Court. Possibly no such application could have been effectively made ; for there is no chairman of quarter sessions in Scotland, and s. 76 of the Act of 1887, by which it was provided that the expression " chairman of quarter sessions " when applied to Scotland should mean the sheriff of the county, was repealed (doubtless by inadvertence) by the Coal Mines Act, 1911. In any case, no further step was taken for procuring the appointment of an arbiter, and accordingly the weight of clean coal gotten by the pursuer was never in fact ascertained in accordance with the proviso. The employers continued to deduct half a hundredweight from the weight in each hutch, and to pay wages on that footing. The wages were accepted under protest, and this action was brought for the amount claimed as payable in respect of the amounts deducted, that is to say, for the difference between the wages actually paid and the wages calculated on the gross weight in the hutches.

What then is the legal position ? It cannot be that the appellants, who were under contract to pay wages calculated on the weight of clean coal gotten by the respondent, and who have made every endeavour to get that weight ascertained in accordance with the Act, though without success, are now bound to pay on the gross weight in the hutches, that is to say, on stones and dirt as well as coal. I think the true view is that, the machinery provided by the Act for ascertaining the proper deduction having broken down, the parties were remitted to the position in which they would have stood if the proviso had not been inserted in the Act or had not been adopted. In other words, the employers were bound to pay on the actual weight of clean coal gotten

H. L. (Sc.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Viscount Cave.

H. L. (Sc.) by the respondent, and this amount had to be ascertained before the amount due for wages could be fixed. It was therefore for the respondent, if he disputed the wages offered to him, to prove what weight of clean coal was in fact gotten by him during the period in question. This involved no hardship upon him, for he might have concurred in the appointment of an arbiter and thereby determined the dispute. In fact, he has failed to prove that he got coal to an amount represented by the wages sued for in this action. On the contrary, the evidence shows clearly that the deduction of half a hundredweight from each hutch filled by the respondent does not exceed the average weight of stones and dirt in the hutch, and accordingly that the respondent's claim in this action is for a wage calculated on the weight of stones and dirt and not on the weight of coal. If so, his claim must fail. The above decision is entirely consistent with the decision of this House in *Netherseal Colliery Co. v. Bourne* (1), where the decision was that slack or small coal was coal, and must therefore (notwithstanding any agreement to the contrary) be taken into account in ascertaining the weight upon which the wages should be paid. It is also quite consistent with the decisions (apart from dicta) in *Brace v. Abercarn Colliery Co.* (2), and *Kearney v. Whitehaven Colliery Co.* (3), as well as with the decisions of the Court of Justiciary above referred to.

For the above reasons I am of opinion that this appeal should be allowed and the action dismissed with costs here and below.

LORD DUNEDIN (read by LORD SUMNER). My Lords, the coal in the Blairhall Colliery is in some of the seams so associated with foreign substances that it is impossible in the course of ordinary working to send up filled trucks or hutches in which there is not a certain admixture of foreign substances with the coal. The colliers being engaged at a certain rate of wage dependent on the amount of clean coal

(1) 14 App. Cas. 228.

(2) [1891] 1 Q. B. 496; [1891]

2 Q. B. 699.

(3) [1893] 1 Q. B. 700.

1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
—
Viscount Cave.

sent up by them, the matter was arranged prior to November, 1914, by a fixed deduction being made from the gross weight of each hutch of coal weighed at the pit head. This arrangement, if not the subject of actual agreement, was acquiesced in by the men, and no question can now be raised as regards it. Up to this time there was no checkweigher appointed at the colliery, but in November, 1914, a checkweigher by the name of Tuke was appointed. Acting upon instructions received from the Union he took exception to this method, and a correspondence ensued between him and the managers of the colliery. On March 4, 1915, a meeting of the men was held at which it was agreed "that deductions be made." This was communicated to the colliery owners by the following letter from Mr. Macbeth, the law agent who was acting for the men: "Dear Sir. Along with Mr. Lee of the Miners' Union I had a meeting at Blairhall to-day with the men. After discussion, the men agreed to adopt the provisional Agreement which was entered into when Mr. Adamson, Mr. A. Robertson and I met you, Mr. France, and the Messrs. Russell on 25th ulto.—the weigher and checkweigher to decide what deductions, if any, should be made for foreign material in the hutches, in accordance with s. 12 of the Coal Mines Regulation Act, 1887, which is incorporated in the Coal Mines Act of 1911. Mr. Russell, senior, you will remember, said that he was willing that this method should be given a trial for a month, and we hope that the experience both of the men and of the Company will be satisfactory under this arrangement. The men asked me to-day what proceedings I proposed to adopt for recovery of the deductions illegally made, and I shall be glad to know what suggestion you have to make for a settlement, Yours faithfully, (Sgd.) Jas. Currie Macbeth." When, however, the weigher and the checkweigher came together it became apparent that a serious difference of view existed between them. The weigher, on behalf of the owners, proposed the old deduction of half a hundredweight per head, based on the average obtained from actual weighing after crow-picking of sample hutches. The checkweigher on the other hand refused to consider

1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Lord Dunedin.

H. L. (Sc.) 1920
 COLTNESS
 IRON
 COMPANY
 v.
 DOBBIE.
 Lord Dunedin.

any such method. He had been advised that inasmuch as this method had not been agreed to by the men as a special method there was no legal mode left except to take actual weight, which could only be obtained by crow-picking each hutch. He, therefore, refused to do anything except co-operate in such an operation, and eventually as the owners would not consent to do this he relinquished his attendance at the pit. To crow-pick each hutch was a practical impossibility, as it would mean the stopping of the colliery, as the checkweigher was well aware; but he only followed his instructions. Nothing more was done in view of the attitude of the checkweigher. The owners in paying the men continued to make the half-hundredweight deduction. In view of the critical period of the war, both parties had the patriotism and good sense to continue the work.

The present action was raised for the purpose of recovering from the owners the sum which was due on the assumption that payment had to be made for the total weight of the contents of the hutches. Originally it was laid for a random sum of 5*l.*, but, the action being dismissed as irrelevant by the sheriff-substitute, the pleadings were by the sheriff allowed to be amended, and the conclusions were altered to the exact sum which on the above-mentioned hypothesis was due to the individual pursuer, a miner. The Second Division of the Court of Session to whom the case was taken by appeal affirmed the view of the sheriff and allowed a proof. The proof was taken by one of themselves and reported; and judgment was then given for the pursuer by a majority, Lord Salvesen dissenting. Appeal has now been taken to your Lordships' House. The determination of the case depends on the interpretation of s. 12 of the Coal Mines Regulation Act, 1887. The ruling Act of the moment is the Coal Mines Regulation Act, 1911; but that Act, while repealing generally the Act of 1887, specially saves some sections, of which s. 12 is one, and does not otherwise deal with this matter of the payment of miners by weight and the fixing of deductions. [His Lordship read s. 12, sub-s. 1.]

Now the view of the majority of the learned judges comes

to this. The mineral they say was weighed. An agreement was come to that deductions should be made; but the deductions could only be made in the way provided for by the statute. No agreement had been made by the men for deductions by way of the special mode of making an average deduction. The weigher could not make the deductions at his own hand, because of the existence of a checkweigher. The checkweigher and the weigher together had never made a deduction because the checkweigher would not agree to the proposition of the weigher, and the weigher did not act in accordance with the proposition of the checkweigher; consequently no deductions had been made according to statute. The result was that the owners were bound to pay on the total weight taken. My Lords, it is this last step which is, in my opinion, fatal to the judgment. I have little doubt as to how the learned judges came to this conclusion. I think they proceeded upon what they considered had been the opinion of the House in the *Netherseal Case*. (1) In that case the deduction made from the total weight was such coal as by the passage through a sieve came to be denominated as slack. The judgment was that the only deduction allowable was for foreign matter, but the slack being coal, which was the mineral according to the weight of which the wage was to be paid, it could not form the subject of a legal deduction. This does not touch the point; but undoubtedly in his opinion Lord Halsbury pointed out that the weight to be taken was the weight of all that filled the tub, and that that weight must be paid for with deduction only of such amounts as were lawfully arrived at in the methods allowed by the Act. My Lords, I cannot help thinking that sufficient attention was not paid to the fact that the *Netherseal Case* (1) was decided upon the Act of 1872, which is materially different in its terms from the Act of 1887. In the earlier Act the statutory injunction as to payment is that the work is to be paid according to the weight of the mineral gotten. In the Act of 1887 the payment is to be made according to the weight not of the mineral gotten, but of the mineral contracted to be

H. L. (SC.)

1920

COLTNESS
IRON
COMPANY
v.
DOBRIE.

Lord Dunedin.

(1) 14 App. Cas. 228.

H. L. (Sc.) gotten. Now here the mineral contracted to be gotten was
 1920 clean coal. There was no obligation to pay except for clean
 COLTNESS coal. Accordingly the inference which the learned judges
 IRON drew—namely, that if deduction was not lawfully made, pay-
 COMPANY ment must be made according to the full contents of the
 v. hutch—is an inference which could be made under the Act of
 DOBBIE. 1872, but could not be made under the Act of 1887 if it is
 [Lord Dunedin. — admitted, as it is, that the full contents of the hutch con-
 tained matter other than mineral contracted to be gotten.

My Lords, this consideration is sufficient to dispose of this appeal. As the judgment stands, it is a decree for payment for something which the statute says is not to be paid for—namely, something which is not mineral contracted to be gotten; but the case has been brought as a test case, and we have had full arguments as to the effect of the statute, and I think, therefore, it is only right that I should say more as to the statute in general. The leading enactment is that contained in s. 12, sub-s. 1, that where the bargain is for payment by results of mineral extracted, the miners shall be paid by the weight of the mineral contracted to be gotten. And then follows the instruction that the mineral shall be duly weighed. Not, observe, the mineral contracted to be gotten but the mineral. Now in some seams no trouble would arise, for in such seams it would be possible to send up clean coal; but there are other seams where a certain admixture of blaes or stones is a necessary concomitant of the coal. The proviso which follows is put in to meet such cases, though doubtless it would have been better expressed if not put in the form of a proviso; the proviso form being appropriate indeed to the scheme of the Act of 1872, but not to the scheme of the Act of 1887. The proviso meets the practical difficulty and provides for an agreement between owners and men to make a deduction from the only weight to be weighed, to wit, the gross weight. An agreement being come to that deduction should be made, the deductions then are only to be made in certain statutory ways. First, an agreement as to any special mode arrived at between owners and men. This, if made, would bind all

men in the colliery and no individual could quarrel with it. Undoubtedly an average deduction would fall within the term "special mode." Failing this agreement then the deduction was to be settled first by a person appointed by the owners if there is no checkweigher in existence; or second, if there is a checkweigher in existence, then by agreement between the two, with an arbiter called in if they cannot agree. Now on this there is a remark to be made. It seems to have been thought, and the law agent's advice in the present case, contrary to his own individual opinion, but due to his interpretation of the Home Office letter, was to the effect that a deduction per average was such a special mode as to be available only to an agreement by the men as a whole, and not available to be fixed by the owners' representative and the checkweigher, and failing agreement by the arbiter. I need not inquire whether the Home Office letter, which is a little obscure, really meant this. If it did not, it does not matter; if it did, it is wrong. I am clearly of opinion that any method of deduction, including deduction per average, was open to the determination of the owners' representative and the checkweigher if they agree, or to the arbiter if they do not. The erroneous belief as to this is the seat of the whole trouble. It is quite clear that the checkweigher in this case, instructed by his union on the supposed legal point, thought that he could force the owners to pay for dirt by the simple process of getting the men not to agree to a deduction per average as a special mode, and then refusing upon the plea of illegality to concur in fixing any mode except weighing each hutch, a practical impossibility, as he frankly admitted in the witness box. I refer to the evidence of Tuke where he said "If every hutch had been crow-picked the colliery would have been stopped." If this were right, then the Act would have been made to contradict itself, for the men, as here, would only have to refuse to adopt a special mode in order to compel the owners to pay for what the statute particularly says they shall not pay—namely, the whole contents sent up as opposed to the mineral contracted to be gotten.

H. L. (Sc.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
—
Lord Dunedin.
—

H. L. (Sc.)

1920

COLTNESS
IRON
COMPANYv.
DOBBIE.

Lord Dunedin.

Sir John Simon, for the owners, strenuously argued that in this case the checkweigher having renounced his functions there was no checkweigher, and accordingly the owners' representative at his own hand was entitled to make the deduction of the half-hundredweight per hutch. I do not think so ; I think that as soon as the weigher said he proposed to take half a hundredweight as a fair deduction, and the checkweigher said he proposed that each hutch should be weighed, there arose a difference between them, and that if either side wished a binding decision they ought to have called in the arbiter. It has been pointed out to us that the arbiter is a person appointed by the chairman of the Court of quarter sessions—a term inapplicable to Scotland ; and that the interpretation clause of the Act of 1887 which provides that in application to Scotland this should mean the sheriff of the county, has been, no doubt *per incuriam*, repealed by the Act of 1911. This is a case where the *nobile officium* of the Court of Session may by petition be invoked to get out of the difficulty. Let me again point out that whereas a settlement of average as a special mode arrived at by arrangement with the men would bind all, the determination of the weigher and checkweigher, and on difference by the arbiter, would only bind the individual. Such a judgment would doubtless be repeated, and further it is clear that the whole question of whether a sufficiency of test had been taken to strike a true average would be a question for discussion and, failing agreement, for arbitration. The result is that, the Act standing as it is, there is, in a dirty seam, only one practical way of working it out—namely, to agree, as has been done, to make deduction ; and then to allow the deduction to be fixed in any way that the owners' representative and the checkweigher may fix, and, failing their doing so, by arbitration. As the case stands the owners, it is true, have not fixed the deduction, but the man has not proved his case, and the judgment of the House, in my opinion, ought to be to reverse the interlocutor appealed against and to remit the case to the Court of Session with instruction to dismiss the action with expenses to the defenders.

LORD ATKINSON. My Lords, I concur. As has already been stated the pursuer was a miner in the employment of the defenders at their Blairhall colliery in the county of Fife. It is stated in the third Condescendence of the respondent that when he entered the service of the defenders, it was understood and agreed between them that deductions should be made from the gross weight of the minerals sent up the pit by the pursuer, in respect of stones or substances other than the minerals contracted to be gotten. From January 1, 1895, to March 6, 1915, deductions were made from the minerals so sent up at the rate of half a hundredweight from each hutch full, a rate which, according to the evidence of James Horne, a deputy of Tuke the checkweigher, was not unfair to the miners; and the pursuer was paid his wages on the assumption that all material which remained in the hutch after this deduction was coal. He now sues, and has obtained judgment for 6*l.* 17*s.* 2*d.*, the difference between the amount of wages he on this assumption received, and what he would have been entitled to receive had no deductions been made. This demand necessarily involves a claim to be paid for all he sends up as if it were coal, no matter how much or how little coal may, in fact, be contained in each hutch.

The claim is entirely inconsistent with the agreement set forth in Condescendence No. 3. It would appear to me to be unjust, in fact, because it is proved by the witness Horne (Appendix, p. 90), who has worked for many years in these mines, that he could not fill a hutch with perfectly clean coal—that there is always necessarily a quantity of dirt in every hutch as it goes up from the bottom of the pit. At common law, if a workman be employed to do a certain piece of work at so much per yard or per ton or per any other unit of measurement, he must, *prima facie*, before he is entitled to be paid at the stipulated rate per unit, prove the number of units of the particular work he has executed. The burden is on him. In this case that principle would seem to have been reversed, and the compound of coal and dirt sent up in each hutch was to be assumed to be all coal, unless and until the employer proved what precise proportion

H. L. (Sc.)

1920

COLTNESS
IRON
COMPANY
v.
DOBBIE.

H. L. (Sc.) of the compound is coal, and what dirt. In Condescendence 3
 1920 it is further stated that it was part of the agreement there
 COLTNESS set out that the deductions which it was agreed should be
 IRON made from the gross weight of mineral sent up should be
 COMPANY ascertained as provided by s. 12 of the Coal Mines Regulation
 v. Act of 1887. This statute received the Royal Assent on
 DOBBIE. September 16, 1887. It was preceded by an earlier statute,
 Lord Atkinson. the Coal Mines Regulation Act, 1872, which it repeals.

Sect. 17 of the Act of 1872 is, with the exception of the pregnant addition hereinafter mentioned, practically identical with s. 12 of the Act of 1887. The two last lines of the first paragraph of s. 17 run, "to be paid according to the weight of the minerals gotten by them, and such minerals shall be truly weighed accordingly," whereas the last four lines of the first paragraph of s. 12 of the Act of 1887 run, "be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near the pit's mouth as is reasonably practicable." By this addition it is, in my view, made perfectly clear that by this first paragraph of s. 12 all obscurity is removed. "The mineral gotten" is treated as the whole, of which the mineral "contracted to be gotten" is but a part. The proviso to each of the ss. 17 and 12 respectively, shows that what it was desired to get at for the purpose of payment was "the mineral contracted to be gotten." The deductions about which the owner, agent or manager and the persons employed in the mines were free to agree were the deductions which should be made in respect of stones or material "other than the mineral contracted to be gotten." In s. 12 the above-mentioned addition is introduced to make the object of the proviso all the more clear. Before deductions can be made it is but natural that the weight of the whole from which they are to be made should be ascertained. This is secured by the provision that the mineral gotten (which may include shale or ironstone minerals) should be weighed. There is no obligation whatever imposed upon the owner to weigh that portion of it described as the "mineral contracted to be gotten." The words introduced into the Act of 1887

naming the place where the weighing is to take place would seem to indicate this—namely, the words “at a place as near to the pit’s mouth as is reasonably practicable.” Those words are not found in the Act of 1872. The case of *Bourne v. Netherseal Colliery Co.* (1), much relied upon on behalf of the respondent, was decided on the Act of 1872 in the Queen’s Bench Division on July 13, 1887. The plaintiffs there claimed to recover a sum of 20*l.* 8*s.* wages earned by them in getting coal for the defendant. They claimed the same amounts also as having been illegally and improperly deducted from their wages without the assent of the checkweigher at the colliery, and against the provisions of the Act of 1872. The plaintiffs were there employed under an agreement whereby they agreed to serve the defendant company from the date of the agreement, and to obey the general and special rules and regulations of the colliery, and also that the mineral contracted to be gotten referred to in the Coal Regulation Act of 1872 should in all cases mean and include only such pieces of coal as could not fairly be passed through an ordinary loading rake, the clear spaces between the prongs of which are two and a half inches wide. After a strike the men returned to work on the terms that coal should be paid for at 16*d.* per ton with a premium of 2*d.* per ton in certain cases, and further that no slack whatever should be paid for except that sent out as heading slack, all other kinds of slack being deducted from the different hutches in proportion to their loading. The practice was that the tubs or hutches containing the material won were raised and weighed by a weigher and checkweigher, and the weights taken down. The coal was then moved in trucks to a place where it was sorted into classes, and after being sorted was taken to a place forty yards away and shot down six feet on to a screen, part of a machine called “Billy Fairplay,” and a boy who was in the employ of the company noted from a dial the weight of the slack that had gone through the screen. The men were paid upon the weights handed in by the checkweigher. The case came before the county court judge, who gave judgment

H. L. (Sc.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE,
—
Lord Atkinson.

(1) 19 Q. B. D. 357.

H. L. (Sc.) 1920
 COLTNESS
 IRON
 COMPANY
 v.
 DOBBIE.
 Lord Atkinson.

in favour of the defendant company. The plaintiffs appealed to the Queen's Bench Division, when Stephen and Wills JJ. decided in favour of the plaintiffs solely on the ground that the deductions for slack were not determined by the persons named in s. 17 of the Act—namely, the “Banksman or weigher and checkweigher (if there should be one)” —but by a boy who managed a machine called “Billy Fairplay.” The defendants appealed to the Court of Appeal (1), when it was held by Lord Esher M.R. and Lopes L.J., Fry L.J. dissenting, that the mineral contracted to be gotten was, within the meaning of the statute, coal, and that slack, being a part of such coal, deductions in respect of it were unauthorized, that so much of the contract as related to it was therefore void and that the plaintiffs were entitled to recover. On appeal to this House (2) the decision of the Court of Appeal was affirmed by Lords Halsbury, Herschell, and Macnaghten on the ground, according to the headnote, that by the contract the amount of the wages paid depended on the amount of mineral gotten within the meaning of s. 17, but the miners were not paid according to the weight of the mineral gotten, nor was such mineral truly weighed accordingly, within the meaning of the section, for the mineral contracted to be gotten was coal including slack, and slack was not material other than mineral contracted to be gotten and was, therefore, not one of the things allowed by that section to be deducted.

Though the special agreement entered into in that case differs from that entered into in the present case, the decision supports the case of the defendants rather than that of the plaintiff; inasmuch as it establishes that where the matters deducted are such as cannot be legally deducted, the miner is entitled to be paid for the full amount of that which the statute fixes as the measure of his wages. In the statute of 1872 the measure is “the weight of the mineral gotten.” In the Act of 1887 the measure is different, it is the actual weight gotten of the “mineral contracted to be gotten” which is coal. I have dealt with this case at some length because I think it has been misapplied in argument on behalf of the

(1) 20 Q. B. D. 606.

(2) 14 App. Cas. 228.

respondent. In my view it lends no support to the contention H. L. (Sc.)
 that if no deductions be legally made the employer is bound to 1920
 pay for a mixture of coal and dirt sent up from the pit, as if COLTNESS
 it were all coal. The whole object and design of the proviso IRON
 to s. 12 of the Act of 1887 is to set up machinery by which COMPANY
 the amount of the mineral contracted to be gotten can, by v.
 the deduction of stones and substances other than this mineral, DOBBIE.
 be ascertained. The practice adopted in the colliery for Lord Atkinson.
 ascertaining the amount of coal won was by taking at random
 some of the hutches sent up, as fair specimens of all the others,
 having those crow-picked, ascertaining thus the weight of
 the average amounts of dirt (other than that removable by
 washing) contained in them and deducting that average
 weight from all the other hutches. The proprietors show
 pretty clearly that the amount deducted under this system
 was in fact insufficient. No case is made out that it was
 unfair to the men as a body. By s. 12 of the Act of 1887 it
 is enacted that the deductions to be made may be determined
 by three different modes or methods. (1.) By such a "special
 mode" as may be agreed upon between the owner, agent or
 manager of the mine on the one hand and the persons employed
 in the mine on the other. This obviously means a mode
 which is to be decisive according to its terms and to be applied
 as long as the agreement in reference to it remains in force;
 (2.) By some person employed by the owner, agent or manager;
 and (3.) If any checkweigher is stationed for such purpose
 as thereafter mentioned, by such person and such check-
 weigher. It was suggested that Charles Tuke, who was
 appointed checkweigher by the men, was not appointed for
 the purpose of determining the deductions to be made. I
 think the evidence establishes the contrary. It is obvious
 that if this last mode or method is to work provision must
 be made for the case where the two persons thus selected
 are unable to agree; and accordingly it is provided in s. 12
 that, in case of a difference between them, the deductions
 to be made should be determined by a third person to be
 mutually agreed on by the owner, agent or manager of the
 mine on the one hand, and the persons employed in the mine

H. L. (Sc.)
 1920
 COLTNESS
 IRON
 COMPANY
 v.
 DOBBIE.
 Lord Atkinson.

on the other, or, in default of agreement, the person appointed by a chairman of quarter sessions within the jurisdiction of which any shaft of the mine is situate. By s. 76 of this same statute the chairman of quarter sessions is, in the application of the Act to Scotland, defined to mean the sheriff of the county. But this section of the Act of 1887 is, together with all the others save those numbered 1, 3, 12 and 13, repealed by s. 126 and Sch. 4 of the Coal Mines Act of 1911. So that this last provision of s. 12 of the Act of 1887 cannot be taken advantage of. It is still open, however, to the persons employed in the mine to withdraw their checkweigher, or to retain him and give him and the representative of the owners an opportunity of agreeing to a third person to be brought in as an umpire. The weigher appointed on behalf of the owners of the mine was of opinion that the established practice of crow-picking the contents of some of the hutches selected at random, finding thereby the average weight of dirt found in them, and deducting this average in all cases, was fair and ought to be adhered to. Mr. Tuke, the checkweigher, insisted that every hutch should be crow-picked and the weight of dirt found deducted from the weight of the full hutch. It is not disputed that such a method as this is absolutely impracticable. The letters of Charles Tuke dated March 16 and 17, 1915, respectively, the first addressed to Messrs. Macbeth, MacBain and Currie, and the second to Peter Warden the weigher, show the nature of the demand made by the writer, its genesis and object; while the letter written on March 16, 1915, on behalf of the company shows, I think, that they were ready to act reasonably. Mr. Tuke states in both his letters that he was willing to agree that the actual amount of dirt found in any tub should be deducted from that tub only, and Mr. Robert Russell, writing on behalf of the company, states that at a meeting to which he refers both parties agreed that crowing each hutch was impracticable. But I am quite unable to see how it can be said that when two persons are appointed to do a certain thing, and one insists on doing it in one way, which is practical, and proved to be reasonable and fair, and the other insists upon doing

it in another and a different way, which happens to be impracticable, there is not a difference between them within the meaning of this proviso to s. 12 of the Act of 1887. The difference referred to is not confined to a difference as to the mode of applying, or the result of applying an agreed test or an agreed mode of measurement. It, in my view, clearly extends to a difference as to the nature of the test or mode of measurement itself which is to be applied for the purpose named. It is also, in my view, perfectly clear that there is nothing whatever to prevent the weigher and checkweigher agreeing to a mode in which the deductions might be determined. That is not the "special mode" referred to in the first part of the proviso. And indeed it is difficult to see how, where no special mode, properly so called, has been agreed upon, they could ever arrive at any result unless they did so agree.

H. L. (Sc.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Lord Atkinson.

In my opinion, therefore, the pursuer has wholly failed to show that he is entitled to recover the sum for which he has obtained judgment. I think the decision appealed was erroneous and should be reversed, and this appeal be allowed with costs.

LORD MOULTON. My Lords, the present appeal is from an interlocutor decreeing payment to the pursuer of the sum of 6*l.* 17*s.* 2*d.* with interest. The amount to which our decision relates, therefore, is in itself trifling, but the case is one of great importance, not only because it is a test case governing many others, but also because it involves the interpretation of s. 12 of the Coal Mines Regulation Act, 1887, which governs the payment of wages to all coal miners who are paid according to the coal they raise. The claim is for wages unpaid. The pursuer, who is a miner in the employ of the defenders, avers that he has raised some eighty odd tons of coal in excess of that for which the defendants have paid him. The Courts below have found that he is entitled to his full claim. There is no dispute as to the rate of payment, so that the interlocutor is equivalent to a finding that the pursuer has proved that he has in fact raised the whole of the coal for which he claims.

H. L. (Sc.) The peculiarity of the case is that everyone concerned—
 1920 pursuer, defenders and judges—knows that such a finding
 COLTNESS is contrary to the facts of the case. There can be no dispute
 IRON as to this, for the claim is based upon the gross weight of
 COMPANY mineral sent up by the pursuer during the period in question,
 v. and it is common ground that such mineral did not consist
 DOBBIE. entirely of coal but contained substantial amounts of stones,
 Lord Moulton. rubbish and dirt. Nay, further, I do not think that it is
 seriously contested on the evidence as it stands that the total
 amount of such extraneous material was at a fair estimate
 at least equal to the weight claimed for by the pursuer in
 this action.

The dispute between the parties turns, therefore, rather upon a question of the respective rights of the pursuer and defenders under the relevant clause of the statute regulating the payment due to the pursuer, than upon any genuine difference of opinion between the parties as to the facts of the case. I shall therefore proceed at once to examine s. 12 of the Coal Mines Regulation Act, 1887, which is the clause in question. The enacting portion of this clause reads as follows: "Where the amount of wages paid to any of the persons employed in a mine depends on the amount of mineral gotten by them those persons shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable." The drafting of this clause is, in my opinion, very careful and accurate and shows that in the mind of the draftsman there was a clear perception of the subject-matter to which it relates and of the legislative provisions which were to be made respecting it. A clear distinction is drawn throughout between "mineral gotten" and "mineral contracted to be gotten." By "mineral contracted to be gotten" is meant (in the case of a coal mine) the coal itself. By "mineral gotten" is meant the total mineral sent up by the miner, which includes stones and substances other than coal which come up in the hutch together with the coal. If there could be any doubt about this construction of the two phrases

it would be set at rest by reference to the proviso which H. L. (Sc.) speaks of deductions: "in respect of stones or substances other than the mineral contracted to be gotten, which shall be sent out of the mine with the mineral contracted to be gotten." The enacting part of the clause therefore provides that where wages depend on results the miners shall be paid not upon the total weight of the mineral gotten by them, but upon the amount of coal contained in it. This is a fair basis of payment, because it is the coal that measures the value of the work done by the miner. The stones and rubbish are not only useless when brought to the surface, but they are much better left in the pit where they serve to lessen the volume of the excavation and pro tanto diminish the consequent subsidence of the surface.

But there is a further provision in the enacting part of the clause. No doubt it is primarily for the protection of the miner, but it is truly in the interests of both parties that an accurate record should be taken of the only relevant matter that can be definitely and accurately ascertained at the moment without hindrance to the working of the pit—i.e., the weight of the total contents of the hutch. The Legislature throws upon the employer the duty of ascertaining this. But it is only the weight of the total mineral that can thus be ascertained, and the words of the clause make it clear that this is realized and intended by the Legislature. The words used in this connection are "mineral gotten" not "mineral contracted to be gotten." The actual provision relating to it reads thus: "the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable." The Legislature provides, therefore, that the miner shall be paid according to the actual weight of the coal gotten by him. But it does not, and for practical reasons could not, provide how that weight should be ascertained in each particular case. All that it could do was to provide that the total weight of mineral gotten should be truly and promptly ascertained. There was left unsolved the mode of ascertaining how much of that mineral was actually coal—in other words, what deduction should be made for stones,

1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Lord Moulton.

H. L. (Sc.) rubbish, etc. This is a matter which must depend on the
 1920 circumstances of each particular case and could not be legis-
 COLTNESS latively provided for. But the Act did all that it was possible
 IRON to do to prevent the continual friction that might so easily
 COMPANY arise between the parties in connection with the determination
 v. of this question of fact. It put in a proviso giving to the parties
 DOBBIE. the widest powers of agreement that the necessary deductions
 Lord Moulton. from the gross weight of the mineral should be made, and
 of determining what those deductions should be. From the
 nature of the case these matters must rest ultimately on agree-
 ment. But the proviso goes so far in its efforts to bring about
 and facilitate an agreed method of arriving at the desired
 result, that upon its true construction I am of opinion that
 if the parties have agreed that deductions should be made
 their representatives have the widest powers of agreeing as
 to the mode to be adopted in calculating them.

In the argument before us great importance has been
 attached to the words "special mode" in the proviso. It
 is not a phrase of limitation but simply means the method
 agreed upon, whatever that may be, of settling these
 deductions while the work goes on. It will be noticed that,
 when the parties have agreed that deductions shall be made,
 the mode of making them is a matter that may be agreed on
 by the checkweigher on behalf of the men, and some person
 appointed for the purpose on behalf of the employer, with
 power in case of difference to call in an umpire whose method
 of appointment is specified. There is no need to go back
 to the principals themselves to fix the mode of determining
 the deductions. In practical working this is doubtless of
 great importance, since it is to the true interest of all parties
 that the actual amount of coal raised should be promptly
 and accurately ascertained. But in theory it amounts to but
 little, because any arrangements so made can be put an end to
 by terminating the fundamental agreement that deductions
 shall be made under the terms of the proviso. It is however
 unnecessary to examine the proviso further, because it is
 clear that in the present case the pursuer, together with the
 rest of the miners, refused to act under it. They were of

course entitled so to refuse. The form that their refusal took was that of refusing to agree to any deduction from the gross weight of mineral in any hutch unless that particular hutch had been "crow-picked"—i.e., the contents emptied out and the coal separated from the stones and rubbish and the latter separately weighed. They would not allow the experience thus gained as the amount of extraneous material coming up with the coal to be applied generally or to any other hutches. The pursuer has not even allowed so much as this, for in cases where a hutch was actually crow-picked and the amount of stone and rubbish in it ascertained directly he has claimed for the gross weight without any deduction. It is evident that the defenders could not be expected to consent to such a method of ascertaining the amount of coal raised by the miners. To do it in this way would make it necessary to crow-pick every hutch, and all parties are agreed that it would be impracticable so to do, as it would necessarily stop the working of the colliery. I am afraid that it is clear that this was what the pursuer relied upon. Some one had led the miners to believe that if they did not agree to any practicable method of arriving at the deductions, no rectification of the weights as ascertained by weighing at the pit's mouth could be made, and they would be entitled to be paid on the gross weight of the mineral raised by them whether it was coal or not. In this they were wholly wrong. Their behaviour in this respect could not alter the contract that they should be paid on the actual weight of the "mineral contracted to be gotten," or in other words that their employers should pay them on the amount of coal raised, and on that alone. Agreeing or not agreeing to deductions does not alter the rights of the parties under the contract; it only affects the mode of proof by which the result of those rights in the shape of money is ascertained. If there is an agreed reduction it is binding on both parties, and decides absolutely as between the parties what is the weight of coal which the miner is to be taken to have raised and for which he is entitled to be paid. But if there is no such binding admission as to the weight of coal raised, it must be decided, by whatever

H. L. (SC.)
1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Lord Moulton.

H. L. (Sc.) 1920
COLTNESS IRON COMPANY
v.
DOBBIE.
Lord Moulton.

tribunal has to decide it, by the same machinery by which all other issues of fact are decided—namely, by evidence. The onus is, of course, on the pursuer. He has to prove that he won the coal for which he is claiming payment, and he does not discharge this onus by producing evidence as to the sum of the gross weights of the mineral in the hutches he has sent up, for it is not denied that this was not all coal. The Court must do the best it can upon the whole of the evidence before it to decide how much coal there was in that mineral, and, if it cannot arrive at any conclusion on the point, the pursuer has failed to support his case.

This emphasizes the desirability of the parties behaving reasonably in agreeing to some system of arriving at the net weight of the coal in the hutches which can be applied during the course of the working, so that differences can be settled as and when they arise. The terms of the proviso show that the Legislature contemplated this being done. It assumed that people would try to avoid disputes by behaving reasonably, and I greatly regret that in this case there was a refusal on the part of the miners to adopt any reasonable arrangement to settle the matter by agreement as indicated by the proviso. Such a course of action cannot benefit the party adopting it, for, while the proviso does not in any way alter the contract or compel the parties to act under it, the tribunal which has ultimately to decide the question of fact can hardly abstain from giving the benefit of any doubt which may arise upon the evidence to that one of the parties that has done its best to prevent the dispute arising by its willingness to act reasonably in the matter of agreeing to the proper deductions from the gross weight as indicated by the proviso. In the present case however the sole evidence adduced by the pursuer in support of his claim is the list of gross weights. The defenders adduced evidence which makes it clear that a substantial part of this gross weight was not coal, and in addition gives to the Court evidence on which they can reasonably arrive at an estimate of its amount. Accepting that evidence (which is practically uncontradicted) there is nothing due to the pursuer, because he has been paid upon the weights

for which he claims with the deduction of such amounts of H. L. (Sc.) extraneous matter.

The pursuer has therefore failed to prove his case and the judgment of this House ought in my opinion to be that the interlocutor appealed against should be reversed, and that the case should be remitted to the Court of Session with instructions to dismiss the action.

1920
COLTNESS
IRON
COMPANY
v.
DOBBIE.
Lord Moulton.

Interlocutor of the Second Division of the Court of Session in Scotland reversed, and cause remitted back to the Court of Session in Scotland with an instruction to dismiss the action and to do therein as shall be just and consistent with this judgment. The respondent to pay the costs of the action in the Court of Session and the costs of the appeal to this House.

Lords' Journals, May 11, 1920.

Agent for the appellants: *Walter H. Guthrie, for Ross & Connell, W.S., Dunfermline, and Wallace & Begg, W.S., Edinburgh.*

Agent for the respondent: *P. F. Walker, for Macbeth, Currie & Co., Dunfermline, and Alex. Macbeth & Co., S.S.C., Edinburgh.*

Agents for the Coal Association: *Hair & Co.*

H. L. (E.)*

[HOUSE OF LORDS.]

1920
May 13.

WELD-BLUNDELL APPELLANT;
AND
STEPHENS RESPONDENT.

*Principal and Agent—Confidential Instructions—Duty of Secrecy—Breach of
Duty—Damages—Remoteness—Libel—Repetition of Libel—Novus actus
interveniens.*

The plaintiff employed the defendant, a chartered accountant, to investigate the affairs of a company in which he was interested. In a letter of instructions to the defendant the plaintiff inserted libellous statements concerning two officials of the company. The defendant handed the letter to his partner, who negligently left it at the company's office. The manager found it, read it, and communicated its contents to the two persons defamed, each of whom sued the plaintiff for libel and obtained judgment against him for damages and costs. The plaintiff then sought to recover from the defendant the amount which he had paid for damages and costs in the libel actions as damages for breach of an implied duty to keep secret the letter of instructions.

The jury found that it was the duty of the defendant to keep the letter secret, that he had neglected that duty, and that the actions for libel and the damages recovered therein were the natural and probable consequence of the defendant's negligence, and they awarded the plaintiff substantial damages:—

Held (by Lord Dunedin, Lord Sumner, and Lord Wrenbury; Viscount Finlay and Lord Parmoor dissenting), that the plaintiff's liability for damages in the libel actions did not result from the defendant's breach of duty, and that the defendant was liable for nominal damages only.

Ward v. Weeks (1830) 7 Bing. 211 approved.

Decision of the Court of Appeal [1919] 1 K. B. 520 affirmed.

APPEAL from a decision of the Court of Appeal (1) setting aside a judgment of Darling J. (2) and ordering that judgment should be entered for the appellant for nominal damages.

The action was brought by the appellant against the respondent, and by his statement of claim the appellant claimed the sum of 1679*l.* 14*s.* 8*d.* as damages for breach of contract and/or for the negligence of the respondent.

* *Present*: VISCOUNT FINLAY, LORD DUNEDIN, LORD SUMNER, LORD PARMOOR, and LORD WRENBURY.

(1) [1919] 1 K. B. 520.

(2) [1918] 2 K. B. 742.

By the statement of claim the appellant alleged that he employed the respondent, who was a chartered accountant, as professional adviser to advise him as to the financial affairs of the Float Electric Co., Ltd.; that it was an implied term of his employment that the respondent should keep secret all communications and instructions from the appellant; that on May 4, 1915, the appellant wrote to the respondent a letter containing instructions to him to investigate certain matters in connection with the said company, and that the letter contained references to one W. H. Lowe and Charles Comins defamatory of the said Lowe and Comins; that in breach of his said duty the respondent permitted the contents of the letter to be disclosed to one Hurst; that by reason of the premises Lowe and Comins brought actions for libel against the appellant; that in each action judgment was obtained against the appellant for damages and costs; and that the appellant had paid for damages and costs in the said actions (including the costs incurred by him) sums amounting in the aggregate to 1679*l.* 14*s.* 8*d.*

H. L. (E)

1920

WELD-
BLUNDELL
v.
STEPHENS.

By his defence the respondent pleaded (*inter alia*) that the damages claimed by the appellant were irrecoverable at law and that the statement of claim disclosed no cause of action.

The facts are fully stated in the report of the case before the Court of Appeal, and also in the judgment of Lord Finlay, and for the purposes of the argument they are sufficiently summarized in the headnote.

At the trial of the action before Darling J. and a special jury the jury found (1.) that it was the duty of the respondent to keep secret the letter of May 4; (2.) that the respondent neglected his duty in regard to the said letter, so that the contents thereof came to the knowledge of Hurst; (3.) that the actions for libel brought by Lowe and Comins against the appellant and the damages received by them were the natural and probable consequences of the proved negligence of the respondent, and they assessed the damages at 650*l.*

Darling J., upon further consideration, entered judgment for the respondent with costs.

H. L. (E.) The Court of Appeal set aside the order of Darling J., and
 1920 held that the action was maintainable, and by a majority
 WELD- (Bankes and Warrington L.JJ., Scrutton L.J. dissenting)
 BLUNDELL ordered that the appellant should recover the sum of 20s.,
 v. and that there should be no costs of the action or of the
 STEPHENS. appeal.

SCRUTTON L.J. was of opinion that the appellant was entitled to the damages awarded here by the jury.

1920. Feb. 19, 20, 23. *Langdon K.C.* and *J. B. Matthews K.C.* (with them *Ernest F. Lever* and *d'Alberquerque*) for the appellant. The contract to keep secret the letter of May 4, 1915, being, as the Court of Appeal held, neither illegal nor against public policy, it is difficult to see how the damages flowing from the breach of that contract are irrecoverable upon any such ground. The jury have found that the bringing of the libel actions against the appellant was the natural and probable consequence of the respondent's breach of duty, and have awarded damages on that footing, and there was evidence to support that finding.

[LORD SUMNER. Was not Hurst's intervention in this transaction a *novus actus interveniens* ?]

The point that the damage did not flow from the respondent's breach of duty, but from Hurst's misconduct, was not dealt with by the Court of Appeal, and is not included in the respondent's reasons. It is therefore not open to him. Assuming that the point is open, the need for imposing upon an agent the duty of safeguarding confidential documents arises from the wickedness of human nature, and the test is whether the consequence of which the appellant complains is one which might reasonably have been expected. If the letter had been picked up by Lowe or Comins there could have been no objection to the finding of the jury, and Hurst's intervention makes no difference unless it can be held as matter of law that the jury could not have found as they did. In determining whether the respondent's breach of duty was the effective cause of the damage, human nature must be regarded as it is with all its infirmities and imperfections,

and it is the experience of mankind that the world contains individuals who will not observe the canons of good taste. H. L. (F.) 1920

The authorities establish that the intervention of an act of a third party between the breach of duty by the defendant and the damage caused to the plaintiff does not necessarily break the chain of causation, or in other words does not necessarily make the damage too remote, and this principle applies whether the intervening act be negligent or wilful, and even though it may amount to a criminal offence. The question in each case is, was the defendant's breach of duty the effective cause of the damage? That is a question of fact for the jury: *Engelhart v. Farrant* (1); *McDowall v. Great Western Ry. Co.* (2); *Clark v. Chambers* (3); *Burrows v. March Gas and Coke Co.* (4); *Speight v. Gosnay* (5); *Lynch v. Knight* (6); *Bowen v. Hall* (7); *Rex v. Moore* (8); *De la Bere v. Pearson* (9); *Newman v. Zachary* (10); *Scott v. Shepherd* (11); *Kelly v. Partington* (12); *Rex v. Carlile* (13); *Barber v. Penley* (14); *Lyons v. Gulliver* (15); *Riding v. Smith* (16); *Scott's Trustees v. Moss*. (17) The cases on this subject are collected in 2 Smith's Leading Cases, 12th ed., pp. 515-533, in the notes to *Vicars v. Wilcocks*. (18) That decision is out of harmony with the authorities: Pollock on Torts, 10th ed., p. 250.

[LORD SUMNER referred to Clerk and Lindsell on Torts, 6th ed., p. 156.]

In Salmond on Torts, 4th ed., p. 134, the contrary view is expressed; and see *De la Bere v. Pearson*. (19) In an action for damages for breach of duty—and for the present purpose the result is the same whether the action is founded on

(1) [1897] 1 Q. B. 240.

(2) [1902] 1 K. B. 618, 624;

[1903] 2 K. B. 331, 337.

(3) (1878) 3 Q. B. D. 327, 339.

(4) (1872) L. R. 7 Ex. 96.

(5) (1891) 60 L. J. (Q. B.) 231.

(6) (1861) 9 H. L. C. 577, 590, 600.

(7) (1881) 6 Q. B. D. 333.

(8) (1832) 3 B. & Ad. 184, 188.

(9) [1907] 1 K. B. 483, 488;

[1908] 1 K. B. 280, 290.

(10) (1646) Aleyn, 3.

(11) (1773) 3 Wils. 403; 2 W. Bl. 892.

(12) (1833) 5 B. & Ad. 645.

(13) (1834) 6 C. & P. 636.

(14) [1893] 2 Ch. 447.

(15) [1914] 1 Ch. 631.

(16) (1876) 1 Ex. D. 91, 94.

(17) (1889) 17 R. 32.

(18) (1806) 8 East, 1.

(19) [1908] 1 K. B. 280.

H. L. (E.) contract or on tort—the defendant is liable not for what he intends but for what might have been reasonably anticipated. 1920 The tortious act of the appellant would have been innocuous but for the negligence of the respondent. It was the disclosure of the document which precipitated the danger. WELD- BLUNDELL v. STEPHENS.

Douglas Hogg K.C. and *Patrick Hastings K.C.* for the respondent. The respondent submits three propositions of law, any one of which will support the decision of the Court of Appeal. (1.) It is not damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations, or that he has incurred expense in trying to evade them. (2.) Where a man has been guilty of wilful wrongdoing he cannot recover from a third party the damages resulting from such wrongdoing. (3.) If A. publish defamatory matter to B. he is not responsible for the consequences of a republication by B. unless he authorized such republication. Such an authorization may be express or may be implied from the circumstances of the case.

As to (1.). Assuming that the respondent undertook to keep safe all business documents sent to him by the appellant, and that he has committed a breach of that contract, the appellant has a cause of action against him, but in this case the appellant is entitled to nominal damages only. If the appellant uses a business letter as a means to vilify other people, the respondent's liability is not thereby increased. As soon as the respondent received the document in question there was an actionable wrong done by the appellant to Lowe and Comins, and a wrong that was complete at that moment. There is no authority which suggests that where a man is under an existing liability the disclosure of the existence of that liability gives him a right to recover as damages against the person making the disclosure the amount of the liability. The only damages claimed in this action are the damages which the appellant has had to pay to the successful plaintiffs in the libel actions, and those damages are not recoverable because they were due to the appellant's own wrong. In no circumstances can a man complain that he has suffered damage because he has been compelled by law to

pay his lawful debts, and the reason is that he has suffered no wrong. *Neville v. London Express Newspaper* (1) rightly considered almost concludes the first point in the respondent's favour.

As to (2.), the question is whether the damages occasioned by the appellant's wilful wrongdoing can be claimed as part of the damages arising from the respondent's breach of duty. The principle, as stated by Kennedy J. in *Burrows v. Rhodes* (2), is that a man who does an act which he knows to be unlawful, as constituting either a civil wrong or a criminal offence, cannot maintain an action for contribution or indemnity against the liability which results to him therefrom. This question does not depend upon the form of action—damages or contribution or indemnity—but upon whether the plaintiff knew that what he was doing was a wrongful act: *Colburn v. Patmore*. (3) An express contract to indemnify a man against the consequences of publishing a libel has been held to be void: *Shackell v. Rosier* (4); *Smith v. Clinton* (5); and an implied contract to that effect must be equally void. *Betts v. Gibbins* (6) is merely an illustration of the limitation put on the principle above stated—namely, that a contract to indemnify against a tort where there is no conscious wrongdoing may be good.

As to (3.), there is no evidence that it was the natural consequence of dropping the letter that Lowe and Comins should get to know of it. It was the repetition of the libel by Hurst that was the immediate cause of the damage to the appellant, and for that the respondent is not liable: *Ward v. Weeks* (7); *Dixon v. Smith* (8); *Parkins v. Scott* (9); *Bree v. Marescaux*. (10) The strictures of Kelly C.B. upon *Ward v. Weeks* (7) in *Riding v. Smith* (11) were not concurred in by the other judges, Pollock and Huddleston BB., who distinguished *Ward v. Weeks* (7) while recognizing its

H. L. (E.)

1920

WELD-
BLUNDELL
v.
STEPHENS.

(1) [1919] A. C. 368, 380, 395-6,
434.

(2) [1899] 1 Q. B. 816, 828.

(3) (1834) 1 C. M. & R. 73, 83.

(4) (1836) 2 Bing. N. C. 634.

(5) (1908) 99 L. T. 840.

(6) (1834) 2 Ad. & E. 57.

(7) 7 Bing. 211, 215.

(8) (1860) 5 H. & N. 450, 453.

(9) (1862) 31 L. J. (Ex.) 331, 333.

(10) (1881) 7 Q. B. D. 434.

(11) 1 Ex. D. 91.

H. L. (E.) authority, and in *Ratcliffe v. Evans* (1) Bowen L.J., delivering the judgment of the Court of Appeal, explains the principle upon which alone *Riding v. Smith* (2) can be justified. The law says it is not the probable result of publishing a defamatory statement that it shall be republished unless the person who publishes it does so in such circumstances as imply an authority to republish : *Speight v. Gosnay*. (3) The result of the authorities is stated in Odgers on Libel, 5th ed., p. 413.

1920
WELD-
BLUNDELL
v.
STEPHENS.

They also referred to *In re United Service Company*. (4) Langdon K.C. replied.

The House took time for consideration.

1920. May 13. VISCOUNT FINLAY. My Lords, the action in this case was brought to recover damages for negligence in the custody of a letter intrusted by the appellant (plaintiff) to the respondent (defendant) as his agent. It is alleged in the statement of claim that by reason of the respondent's breach of duty the document came to the knowledge of two persons, Comins and Lowe, who brought actions against the appellant and recovered damages in respect of defamatory statements made in the letter.

The case was tried with a jury before Darling J. The jury found in favour of the plaintiff with 650*l.* damages, but the learned judge upon further consideration entered judgment for the defendant. The Court of Appeal entered judgment for the plaintiff for 20*s.* without costs, and the present appeal to your Lordships' House has been brought, asking that judgment should be entered for 650*l.*, the amount of the jury's verdict and costs.

The appellant had invested a considerable amount of money in a company called the Float Electric Co., Ltd., and was greatly dissatisfied with its management. On receiving a further request for advance of money for the undertaking, he determined to employ the respondent, who is a chartered

(1) [1892] 2 Q. B. 524, 533-4.

(2) 1 Ex. D. 91.

(3) 60 L. J. (Q. B.) 231.

(4) (1871) L. R. 6 Ch. 212, 218.

accountant, and had acted for him before, to investigate the affairs of the company. He wrote to him a letter dated May 4, 1915, out of which these proceedings have arisen. In that letter he complained of the mismanagement of the company, and made severe reflections upon the conduct of Mr. Hurst, the manager, and of Mr. Lowe and Mr. Comins, who had also taken part in its affairs. The letter requested the respondent to go to the bank and get an inspection of the ledger of the company, and then, if necessary, to go on and make inquiries of Mr. Hurst, the manager of the company's office. The respondent handed the letter to his partner, Mr. Swift, asking him to attend to the business. Mr. Swift went to the bank, taking the letter with him, and examined the ledger. He then went on to see Mr. Hurst and had some conversation with him. While in the office he unfortunately pulled out of his pocket, along with some other papers, the appellant's letter to him and left it lying on the floor. On getting back to his own office he realized the loss of the letter and telephoned to Mr. Hurst to look for it and return it to him. Mr. Hurst found the letter and before returning it to Mr. Swift had a copy taken and certified. This copy he showed to Mr. Lowe and Mr. Comins. Each of these gentlemen brought an action against the appellant. Mr. Lowe recovered a verdict for a thousand pounds damages, but by consent this was in the Court of Appeal reduced to 250*l*. Mr. Comins recovered a verdict for 500*l*. It was ruled in both cases that the letter was written on a privileged occasion, but the jury in each case found that there was express malice on the part of the present appellant. Judgment was entered for 250*l*. and 500*l*. accordingly with costs, and the appellant had to pay 1679*l*. in respect of these judgments.

The appellant then brought this action against Mr. Stephens the respondent, to recover damages, alleging that these two actions had been brought in consequence of the negligence of Mr. Stephens and his partner in the custody of the libellous letter. The statement of claim was delivered on July 20, 1917, and claimed damages for the defendant's failure to take proper care of the letter. The defendant denied the

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Viscount Finlay.

H. L. (E.) negligence, and counterclaimed for 45*l.* in respect of professional services rendered to the appellant.

1920
WELD-
BLUNDELL
v.
STEPHENS.

Viscount Finlay.

The following are the questions put by the learned judge to the jury, with their answers :—

“Darling J. Was it the duty of the defendant to keep secret the letter of the 4th May written by the plaintiff to the defendant ?

“A.—Yes.

“Did the defendant neglect his duty in regard to the said letter so that the contents thereof were disclosed or came to the knowledge of Mr. Hurst ?

“A.—Yes.

“Were the actions for libel brought by Lowe and Comins against the plaintiff and the damages recovered by them the natural and probable consequence of the proved negligence of the defendant ?

“A.—Yes. Damages 650*l.*

“(To the Jury) : I understand, Gentlemen, in not giving the full amount claimed you acted on what I suggested, that the conduct of the plaintiff himself was responsible to some extent for the damages which were awarded.

“A.—The Foreman of the Jury : Quite so.”

On further consideration, Darling J. entered judgment for the defendant on the ground that the liability of the plaintiff in damages was in respect of his own wrongful act in publishing the libel, and he rested his decision on two grounds :

✓ 1. He dealt first with the maxim which had been invoked by the defendant *ex turpi causa non oritur actio*, and the contention that the alleged contract of agency related to the custody of a malicious libel by the plaintiff himself.

Darling J. said (Appendix, p. 161 B) :—

“After much consideration I have, however, come to the conclusion that our law does not, and cannot, imply any such promise or term as that which the plaintiff alleges, and therefore no breach of contract or dereliction of duty was committed by the defendant.”

2. The learned judge went on to say that were the case

otherwise, there would remain the question whether the plaintiff could recover against the defendant damages consequent on the action for libel against the plaintiff by Lowe and Comins. He said (Appendix, p. 161, E, F) :—

H. L. (E.)

1920

WELD-

BLUNDELL

v.

STEPHENS.

Viscount Finlay.

✓ “The question to be decided may, I think, fairly be put in these words : ‘Can one recover damages against another because he has had to make reparation for a wrongful act committed by himself?’ I think he cannot.”

An appeal was brought to the Court of Appeal asking that judgment should be entered for the plaintiff, the present appellant, for 650*l.*, the amount given by the jury. The Court of Appeal were divided in opinion. Scrutton L.J. was in favour of the appellant, but Bankes L.J. and Warrington L.J. were of another opinion. They disagreed, indeed, with Darling J.’s view that the action was not maintainable. Bankes L.J. said (Appendix, p. 239 A) :—

“Under these circumstances I do not myself see any objection to holding that the contract as found by the jury in the present case was neither an illegal contract nor one contrary to public policy.”

Warrington L.J. said (Appendix, p. 244 G to 245 A) :—

“On the whole I can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by his principal, and I come to the conclusion that the implied obligation of the defendant in reference to the plaintiff’s documents in general extended to the letter of the 4th May, 1915.”

The decision of the Court of Appeal on this point was obviously right, and no attempt was made on behalf of the respondent to impugn the correctness of this portion of the judgment. Indeed, any decision to the contrary would involve consequences at once extravagant and unreasonable.

✓ It would be startling if it were the law that an agent who is negligent in the custody of a letter handed to him in confidence by his principal might plead in defence that the letter was libellous. There may, of course, be cases in which some higher duty is involved. Danger to the State or public duty

H. L. (E.) may supersede the duty of the agent to his principal. But nothing of that nature arises in this case.

1920

WELD-
BLUNDELL
v.

STEPHENS.

Viscount Finlay.

The majority of the Court of Appeal then proceeded to consider the question whether, assuming the appellant to have a right of action against the respondent, he was entitled to recover the special damages claimed in respect of the actions by Lowe and Comins for libel. They held that he was not so entitled, as the damages in these actions were given in respect of the plaintiff's own wrongful act in publishing a malicious libel.

This part of the case has been elaborately argued before your Lordships, and there has been urged at the Bar of your Lordships' House a further objection to this head of damage which is not noticed in the judgments of the Court of Appeal—namely, that the actions were not the result of the respondent's negligence, but were caused by a novus actus interveniens on the part of Hurst, by whom the existence of the libel was made known to Lowe and Comins. I shall deal with these two grounds in the order in which I have mentioned them.

1. The majority of the Court of Appeal held that, as the plaintiff's letter was a malicious libel, the actions against him with their damages and costs were the result of his own wrong and that therefore he could not recover from the defendant in respect of them.

In arriving at this conclusion the Lords Justices relied upon the law laid down by Kennedy J. in *Burrows v. Rhodes*. (1) Kennedy J. in that case said :—

“ It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom.”

This passage has no application to a case like the present in which a letter written by a principal to his agent on the business of the agency contains reflections upon the character of other persons. It is the duty of the agent to treat such a

(1) [1899] 1 Q. B. 816, 828.

document as confidential, and to take reasonable care to prevent its falling into the hands of others. The case bears no analogy to the class of authorities cited by Kennedy J. in which a man about to commit a crime or civil wrong takes an indemnity from another against the consequences. In the case of an agent, the fact that a letter contains libellous matter is really an additional reason for care in its custody, and a natural consequence, if such documents got abroad, would be an action for damages by the person libelled. In the present case the agent, knowing what was in the letter, took upon himself the duty of safeguarding it, and he must be liable for any damage which directly and naturally results from his failure to do his duty in this respect.

Reliance was also placed by the Lords Justices on the decision of this House in *Neville v. London Express Newspaper*. (1) That was an action for maintenance, and it was decided in this House that an action for damages for maintenance will not lie in the absence of proof of special damage. In that case the action maintained was one to compel the repayment of money which had been obtained by fraud. The London Express Company were the maintainers and the special damage alleged in the action against them for maintenance was that the plaintiff had been compelled to refund the money so obtained. It was decided that this was not special damage which would support an action for maintenance. It would be obviously absurd that a debtor who had wrongfully resisted payment until he was compelled to pay by action should be entitled to recover in proceedings for maintenance the amount which he owed, and which had been recovered from him in the action. The observations on which the respondent in the present case relied were made with reference to an action to recover damages for maintenance. It cannot be laid down as a general proposition that, if a wrongful act is done, the natural consequence of which is that the plaintiff's creditor proceeds to enforce his rights, this may not form a head of damage. This applies with special force with reference to a case in which, by the negligence of

H. L. (E.)

1920

WELD-
BLUNDELL
v.
STEPHENS.

Viscount Finlay.

(1) [1919] A. C. 368.

H. L. (E.) 1920 the agent, facts have been divulged which might support claims for damages for tort against his principal.

WELD-
BLUNDELL
v.
STEPHENS.
Viscount Finlay. Reference was made in argument to the leading case of *Merryweather v. Nixan* (1) and the more recent authorities in which the doctrine on that subject has been developed. I cannot think that cases under this head have any relevance to the present. What they decide is that there is no liability to contribution arising out of the mere fact that damages for a tort have been recovered against two persons; and further that, if it appears that there was a combination to do an act manifestly wrongful, no express contract by one of the parties to indemnify the other would be enforceable. This rests on broad considerations of policy, as it is obviously inexpedient that the law should encourage any combination to commit a tort. There was nothing of the kind in the present case. The facts which gave rise to the liability of Mr. Weld-Blundell to Mr. Comins and to Mr. Lowe occurred when he wrote and delivered the letter to Mr. Stephens, and Mr. Stephens was no party to that act. It is no part of the policy of the law that immunity should be extended to breaches of trust committed by an agent in revealing information which has been given to him in confidence as to facts on which possible claims for damages might be preferred against his principal.

It was sought by the respondent to assimilate the case to one of liability for debt, and it was said that under no circumstances can damages be recovered in respect of the fact that the plaintiff has been compelled to pay money which he owes. This doctrine cannot be of universal application. No such general deduction can be drawn from the doctrine laid down in *Neville's Case* (2), where the money had been obtained by fraud, where restitution was a duty and retention was in itself dishonest. Actions for maintenance are of a very special nature, but even in them the doctrine in *Neville's Case* (2) is not always applicable. For instance, I do not think that *Neville's Case* (2) would govern a case in which the defendant in an action of maintenance had incited a lender to call in the

(1) (1799) 8 T. R. 186.

(2) [1919] A. C. 368.

loan and had maintained an action for the purpose. Payment might otherwise have been allowed to stand over for a long period, and it would be for a jury to appraise the chances of this. The amount of the debt would not be recoverable, but the wrongful act of the maintainer might occasion inconvenience and damage calling for compensation.

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Viscount Finlay.

Similar considerations would apply where the defendant has been guilty of any actionable wrong. If in consequence of that wrong a creditor calls in his debt, why should not this form an item of damage in an action against the wrongdoer? The damages would, of course, not be measured by the whole amount of his debt, but regard might be had to the probability that but for the defendant's wrong the money might have been allowed to remain in the hands of the borrower till a more convenient season.

The consequences might be serious to a mercantile firm even of the highest standing if all those who have legal claims against the firm were set in motion at once to enforce their claims. A third person who by malice or negligence in discharge of his duty to such a firm brings about such pressure by creditors would plead in vain that all that happened was the enforcement of legal debts. The fact that they would have been enforced at some time might prevent liability for the whole amount, but it would be startling if it afforded complete immunity to misconduct by an agent which might entail the ruin of his principal's business.

The extension of the supposed rule as to debts to cases of enforcement of liability for torts which results from the misconduct of an agent would lead to some remarkable results. Take the present case as an illustration. Mr. Weld-Blundell had written a confidential letter to his agent on a privileged occasion. That letter contained libellous matter for which Mr. Weld-Blundell might be made liable if the jury should find that he had been influenced by express malice. The question of damage in respect of the actions for libel brought in consequence of the defendant's misconduct must be determined on the same principle which would apply if the defendant had maliciously and for the purpose of inducing the persons

H. L. (E.) libelled to bring their actions against Mr. Weld-Blundell
 1920 communicated to them the fact that the libellous letter had
 WELD- been written. Mr. Weld-Blundell was under no sort of
 BLUNDELL obligation to Mr. Comins or Mr. Lowe to reveal to them the
 v. existence of this letter in order that they might have the oppor-
 STEPHENS. tunity of bringing actions against him. He would indeed be
 Viscount Finlay. bound to endeavour to remove any unfavourable impression
 which the letter might have created on the mind of his agent
 with regard to Mr. Comins and Mr. Lowe, but there is in such
 a case nothing that corresponds to the duty that is incumbent
 on a fraudulent person to make restitution, or on a debtor to
 pay his debts on demand.

Somewhat similar considerations might apply if the agent's breach of confidence had led to an action for penalties. A man may without any moral delinquency have made himself liable to penalties to a considerable amount at the suit of any common informer. It could not be suggested that there would be any obligation upon him to make these facts generally known in order to give an opportunity to any person who might be so minded to play the part of the common informer. Under such circumstances it may well be, as was suggested in *Neville's Case* (1), that any person who maintained an action for such penalties would be liable to substantial damages in respect of the penalties, the payment of which had been compelled by the maintained action. It might be no answer that there was a legal liability to pay the penalties, as that potential legal liability would never have become effective but for the wrongful act of the maintainer. The same observations might apply if the action for penalties was due to the betrayal by an agent of his principal's confidence.

It is not disputed that the defendant was guilty of a breach of duty as agent. A direct consequence of that breach of duty (subject only to the question of the effect of Hurst's intervention with which I shall deal under another head) was that Mr. Comins and Mr. Lowe brought the actions for libel which, but for the defendant's breach of duty, would never have been brought. It must have been in the contemplation

(1) [1919] A. C. 368.

of the parties that if the letter were allowed to get abroad, actions might very probably be the result, and indeed this probability was the great reason which imposed the duty of precaution in the custody of such a document. The result of the defendant's negligence was that these actions were brought against his principal, Mr. Weld-Blundell. There is no legal principle to exclude the damages in such actions from being taken into account, in estimating the damages payable by the agent. To hold that no such damages could be recovered would be to give practical immunity in many cases to agents who have allowed the secrets of their principals to become known.

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Viscount Finlay.

It is not necessary to consider the question on which Rowlatt J. in *Leslie v. Reliable Advertising Agency* (1) differed from Lord Coleridge J. in *Cointat v. Myham* (2) or the dictum of Lord Lyndhurst in *Colburn v. Patmore* (3). The ground on which Rowlatt J. held that there can be no indemnity in respect of the result of a criminal prosecution is that it is against the policy of the law that the punishment for crime should be mitigated by any contribution in any form from another. No such question arises in the present case where the question relates merely to civil liability.

I cannot agree with the decision of the majority of the Court of Appeal that damages were not recoverable from the agent in respect of actions for libel resulting from his negligence in not taking care of the letter.

- ✓ 2. But at the hearing in your Lordships' House it was further contended that the actions for libel were not the result of the agent's negligence, but of the wrongful act of Hurst in making the letter known to Lowe and Comins. This point was not raised before Darling J. It appears from the transcript that it was raised in the Court of Appeal by the junior counsel for the respondent at the close of his argument. It was not received with favour by the Court, and no notice was taken of it in the judgment. The point is not made in the respondent's case either in the body of the case or in the

(1) [1915] 1 K. B. 652.

(2) [1913] 2 K. B. 220.

(3) 1 C. M. & R. 73.

H. L. (E.) reasons. It has, however, been argued at the Bar of your Lordships' House, and must be dealt with.

1920
WELD-
BLUNDELL
v
STEPHENS.
Viscount Finlay.

In answer to the second question put by the learned judge at the trial, the jury found that the actions for libel brought by Lowe and Comins against the plaintiff and the damages recovered by them were the natural and probable consequence of the proved negligence of the defendant. The jury did not give the full sum which the plaintiff had had to pay in these actions; no doubt because they thought that if the plaintiff had acted reasonably the matter might have been settled on more favourable terms. The contention now raised is that in point of law the learned judge at the trial was bound to withdraw from the jury the consideration of these actions as an element in the damages, as they were really the result of what Hurst did and not of the respondent's negligence. It is urged by the respondent that the act of Hurst in supplying Comins with a copy of the letter was dishonourable, and so it was. By the negligence of the respondent the letter had been left on the floor of Hurst's office. It might have been picked up by any person who had access to the office. If the person who picked it up happened to be a gentleman, no mischief would in all probability have followed, as he would have returned it to the respondent or his partner Mr. Swift. But the person who negligently leaves a paper of this description lying on the floor can hardly say that its being picked up by some one who is not a gentleman is so remote a contingency that it may be disregarded in ascertaining what are the natural consequences of the negligence. It may be picked up by some one who is not sensible of the obligations of honour in such matters, and the divulcation of its contents may then follow. The necessity for special care with regard to documents of this kind arises from the very fact that there are a great many people about who are not very scrupulous. Such a letter may be picked up by some one who reads the letter, and then from a spirit of mischief or by way of amusement talks about it or shows it to some person concerned. Every one knows that such an occurrence is very possible, nay probable. It appears to me that if this point had been taken before

Darling J. he would have been bound to say that the matter could not be withdrawn from the jury. I feel very little doubt that if this point had been raised by counsel for the defendant in his address to the jury they would have said, and rightly said, among themselves that you must take human nature as it is, and that it is precisely because there are mischievous and dishonourable people about that it is necessary to be very careful in the custody of such documents.

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Viscount Finlay.

The fact that the damage was caused by the act of some third person does not prevent its being recoverable if such an act was a natural and probable consequence even though wrongful. I may refer in illustration to some of the cases which have been cited: *Engelhart v. Farrant* (1); *Clark v. Chambers* (2); *Burrows v. March Gas & Coke Co.* (3); *Rex v. Moore* (4); and *Scott's Trustees v. Moss.* (5) In *Bowen v. Hall* (6) Brett L.J., with the concurrence of Lord Selborne, then Lord Chancellor, expressed himself as follows:—

“The decision of the majority” (in *Lumley v. Gye*) (7)

“will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White.* (8) If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person: or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third

(1) [1897] 1 Q. B. 240.

(2) 3 Q. B. D. 327.

(3) L. R. 7 Ex. 96.

(4) 3 B. & Ad. 184.

(5) 17 R. 32.

(6) 6 Q. B. D. 333, 337, 338.

(7) (1853) 2 E. & B. 216.

(8) (1703) 2 Ld. Raym. 938.

H. L. (E.)

1920

WELD-
BLUNDELL

v.

STEPHENS.

Viscount Finlay.

party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendants' act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognise that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognise what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars v. Wilcocks* (1) requires this doctrine for its support, it is in our opinion wrong. We are of opinion that the propositions deduced above from *Ashby v. White* (2) are correct."

It must be borne in mind that the present is an action for breach of duty by an agent in failing to take proper care of a document intrusted to him. It is admitted that he failed to discharge that duty, and the very thing happened which it was his duty to guard against. The precise chain of circumstances which would ensue from negligence could not, of course, be foreseen. If the letter had been picked up by Lowe or Comins it would hardly be denied that the bringing of the actions would have been a natural and direct consequence. So if it had been picked up by a servant whose gossip about it came to the knowledge of Lowe and Comins. I am unable to discover any principle of law which would justify us in holding that this head of damage ought to have been withdrawn from the jury. It was eminently a question for them as to the natural consequence of the defendant's breach of duty. The jury very properly discounted the amount of damages as they appreciated the fact that the appellant's own conduct had probably aggravated his loss.

In my opinion the judgment of the Court of Appeal should be reversed, and judgment should be entered for the appellant

(1) 8 East, 1.

(2) 2 Ld. Raym. 938.

for 650*l.*, the amount of the verdict, with costs in the Courts below and in this House.

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.

LORD DUNEDIN. My Lords, the noble and learned Lord on the Woolsack has stated so fully and accurately the facts out of which this case arises that I need say nothing as regards them. I am in accordance with him as to the first point which was raised before Darling J., and dealt with by the Court of Appeal. There remain two reasons for which it is argued the plaintiff cannot recover the damages he asks as special damage.

My noble and learned friend states one of them as raising the question of whether the damage suffered was the natural consequence of the negligence committed or was the result of a *novus actus interveniens*. Another way of stating what probably is in the circumstances of this case the same question is to ask whether the damages alleged are not too remote. A variety of cases have been cited in support of the proposition that the result may be a natural and probable result although it was indirect. That may be so, I do not doubt.

In addition to the authorities already cited I would add the well-known squib case of *Scott v. Shepherd* (1), and another case which is probably not known here, decided, and I think rightly decided, in the Court of Session: *Scott's Trustees v. Moss*. (2) In that case the occupant of a recreation ground in the vicinity of a large town advertised that a descent from a balloon would be made by parachute within the grounds at a certain time. The descent was made into a field of turnips on a farm adjoining the grounds, and a crowd which had assembled outside the grounds rushed in and injured the fences and turnips. The farmer sued the occupant of the recreation grounds, the Lord Ordinary sustained a plea of irrelevancy, and dismissed the action, but the Inner House recalled that judgment and granted the issue to go to a jury which asked the question whether what had happened was the natural and probable result of what the defendant had done. I have, however, come to the conclusion that there

(1) 3 Wils. 403; 2 W. Bl. 892.

(2) 17 R. 32.

H. L. (E.) 1920
 WELD-
 BLUNDELL
 v.
 STEPHENS.
 Lord Dunedin.

was here no evidence which entitled the jury to give the affirmative answer they did to the question as put to them that the actions for libel and the damages recovered were the natural and probable consequence of the proved negligence of the defendant. I think one may here repeat in terms with change of names the words of Tindal C.J. in *Ward v. Weeks* (1): "It was the repetition of the words by Hurst to Lowe and Comins, which was the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage."

I now pass to the other point, and on this I am again constrained to differ from the opinion expressed by my noble and learned friend. The point as it precisely arises may be a new one, that is to say, we were not informed by counsel of any case which exactly covers the circumstances of this one, nor have I been able to find such a case for myself. This is what makes it possible to distinguish, as my noble and learned friend has done, between this case and such cases as *Burrows v. Rhodes* (2) and *Neville v. London Express Newspaper*. (3) But though the cases are distinguishable upon the ground that the application of the principle is to be found in different circumstances, yet in my opinion the underlying principle is the same. To take first the case of contribution between wrongdoers, which is the first instance given by Kennedy L.J. in the passage cited; why is there no contribution among wrongdoers? Only I think because of the underlying proposition that no man can claim damages when the root of the damage which he claims is his own wrong, for in certain cases there may be contribution. The rule even in England, laid down in *Merryweather v. Nixan* (4), is not a universal rule, but is qualified by the necessity that the doer of the wrong who is suing his joint wrongdoer for contribution "must be presumed to have known that he was doing an unlawful act": *Adamson v. Jarvis* (5) and Lord Herschell in *Palmer v. Wick*

(1) 7 Bing. 211, 215.

(3) [1919] A. C. 368.

(2) [1899] 1 Q. B. 816.

(4) 8 T. R. 186.

(5) (1827) 4 Bing. 66, 73.

and *Pulteneytown Steam Shipping Company*. (1) In other words, if the underlying proposition is absent the rule does not apply. H. L. (E.) 1920

Then as regards *Neville's Case*. (2) It was found by the majority in this House that the maintenance of the action was wrong against the plaintiff although the maintained action was successful. Once it was successful the natural and probable consequence was that the plaintiff had, as a defendant in action, to pay the sums found due. Yet he was not entitled to recover the same as special damage. I confess I can see no ground on which such a result could be reached except the application of the principle for which I am contending. It does not seem to me in the least to explain the matter to say that the action of maintenance is a very peculiar action. I quite agree. If I may put aside for the moment my duty of considering English law alone in this, an English case, and may look at it with eyes which are always open to consider the English law as a foreign system, I think it is a cumbersome curiosity of English law. Nevertheless it exists and forms a liability. It appears to me that the liability which arose in *Neville's Case* (2) from its being successfully shown that the action was a maintained action differs, once it is established, no whit from the liability supposed *ex hypothesi* to be established in this case from negligence, and the result would, in my judgment, have been clear to give as damages the peculiar loss to which the plaintiff was put as the necessary result of the success of the maintained action, were it not for the proposition that a man, as Darling J. puts it, cannot recover damages because he has had to make reparation for a wrongful act committed by himself. WELD-BLUNDELL v. STEPHENS. Lord Dunedin.

In the case of *M'Naughton v. Caledonian Ry. Co.* (3) the late Lord President Inglis, then Lord Justice-Clerk, said as follows: "Where an event is brought about directly by the culpa of two persons, whether joint or several, where the culpa of each has contributed to produce the event, and the event would not have been produced but for the culpa of both,

(1) [1894] A. C. 318, 324.

(2) [1919] A. C. 368.

(3) (1858) 21 D. 160, 163.

H. L. (E.) there can be no claim as between these persons for reparation of injury flowing from that event." I am well aware that this was said in a case of accident where the point in question was what is ordinarily termed "contributory negligence," and it could easily be said that the proposition must be read *secundum subjectam materiem*. None the less it is expressed as a general proposition, and in my humble opinion as a general proposition it is sound. A general proposition is not necessarily vitiated as such because the *subjecta materies* will permit, though it does not enjoin, a limited application.

1920
WELD-
BLUNDELL
v.
STEPHENS.
Lord Dunedin.

For these reasons I am of opinion that the result reached by Darling J. and the majority of the Court of Appeal was right and that the appeal should be dismissed with costs, and I move accordingly.

LORD SUMNER. My Lords, in this case neither the character nor the validity of the contract is now in dispute. The fact and the nature of the respondent's breach of it are accepted, and the only issue is between substantial and nominal damages.

The plaintiff pleaded an employment of the defendant as an accountant, alleging an implied obligation to keep his instructions secret. The case made was not a republication of the appellant's libel or an intentional or wilful disclosure of his letter, but a want of care in the custody of it, whereby its contents became known to the parties whom it defamed. Each member of the Court of Appeal expressly states the obligation, which the defendant broke, to have been an obligation to use care (Bankes L.J., pp. 236 E and 241 A; Warrington L.J., pp. 241 D, 242 D, 245 C, and Scrutton L.J., 248 A and C), and one of the grounds given for the decision against the appellant is that his case is really a claim for indemnity and not for damages due to want of care. As Warrington L.J. puts it: "If the plaintiff is right, the obligation not to disclose is equivalent to an obligation to indemnify the plaintiff against the liability to pay the amount recovered for damages and costs in an action brought as a consequence of the disclosure." The

appellant accepts this decision in the statement which he makes in para. 8 of his case: "The present action was then commenced by the appellant against the respondent to recover damages for the respondent's breach of duty (charged as a breach of an implied term of his contract of employment) to use reasonable care to keep secret the contents of his said letter."

H. L. (E.)

1920

WELD-
BLUNDELL
v.
STEPHENS.
Lord Sumner.

This view of the contract and the breach is accordingly the basis of the present debate, for so far there is no appeal from the decision below. That a man may in some cases contract to be indemnified against his own torts is obvious, but that is not the point. If I do not discuss the question whether a man can lawfully contract with another to repay to him what he is compellable to pay to those whom he libels, I do not wish it to be supposed that I affirm that he can. We have nothing to do here with any duty (which could only be contractual) to hold the appellant harmless from liability for what he had written or to save him from himself or to recoup him even for self-inflicted losses, nor with any undertaking to insure against the risk of the contents of the letter becoming known or absolutely to keep them secret in all events and to guard against the letter being read by anybody, for no such contract is before your Lordships.

Again, this contract of employment contains no special term as to the extent or measure of damages, express or implied. "The damage," says Bowen L.J. in *Cobb v. Great Western Ry. Co.* (1), "must be such as would flow from the breach of duty in the ordinary and usual course of things. That is the general rule, both in contract and in tort, except that in contract the law does not consider as too remote such damages as were in the contemplation of the parties at the time when the contract was made. Subject to that, only such damages can be recovered as were immediately and naturally caused by the breach." This special application to contracts of the rule as to remoteness depends, like other matters of contract, on mutuality and agreement, on some communication between the parties at or before the time when

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Lord Sumner.

the contract is made, or some knowledge and acceptance by the one party of the purpose or intention of the other in entering into the contract. There is no evidence of anything of the kind here. It is true that the respondent said that he realized the letter was dangerous when he got it, but that answer did not purport to refer to actions brought upon it. There are plenty of other ways in which it might make mischief, and indeed when Mr. Stephens asked the counsel who was cross-examining him (Record p. 44 C), "Do you mean dangerous in the sense that it was libellous?" all the answer he got was: "A highly dangerous letter to the interests of Mr. Weld-Blundell unless it was kept from the knowledge of those whose names are referred to in it." To that it was that he replied that he realized it was dangerous. As a matter of fact, nothing passed between the parties on the subject, and so far was any such special contemplation from the appellant's mind that, when Messrs. Comins & Co.'s solicitors asked him to apologize for his letter, his answer was: "I suppose you will not venture to deny my right, even in this land of fools and rogues, to say or write what I please to my own servants, such as Comins, Hurst, Stephens, etc., more especially when, as in this case, I limit my remarks to what is and has been a subject of common knowledge to and among all of them or, as you put it, among the entire gang in my employment." (Record p. 81.) Clearly Mr. Weld-Blundell thought he could write to Mr. Stephens what he liked without being under any legal liability, whether the letter became known or not. There is no evidence that any such thing was in the contemplation of either party; certainly it was not in that of both. There is therefore no ground for applying to the defendant's breach of contract in this case any other measure of damages than such as would have applied if it had been a breach of a non-contractual duty.

Now the only damages of which there was any evidence consisted of the damages and costs, both the successful plaintiffs' and his own, which were recovered against the appellant or incurred by him in the libel actions. Obviously there might have been other substantial damages recoverable

against Mr. Stephens, if they could have been proved—for example, the cost of advertising for the lost document and getting it back; but how is the appellant to show that his payment of the above-mentioned damages and costs was the respondent's doing or the respondent's fault?

My Lords, either the sums which the appellant had to pay were the direct result of what he did himself and were self-inflicted injuries, or they were caused not by Mr. Stephens but by Mr. Hurst. As to the costs, the appellant brought them on himself by electing to defend what in truth were undefended actions. If it be said that, until express malice was found by the jury his liability might be only nominal, that it was reasonable for him to take his chance on this issue, and that he was put in the position of having to elect by the respondent's want of care, the fact still remains that he was, in part at least, the author of his own wrong by publishing the libel at all. To say that Mr. Weld-Blundell gave Mr. Stephens the opportunity of making him liable and that Mr. Stephens took it and did so, is to my mind a mere quibble. The appellant's liability did not depend on or spring from Mr. Stephens, unless a mere occasion is identified in law with cause. The way in which the appellant must naturally and necessarily state his case seems to me to put this view in a nutshell. "True it is," he says, "that I libelled Messrs. Comins and Lowe to Mr. Stephens; but, if Mr. Stephens had not lost my letter, they would have known nothing about it, and I should have escaped the consequences of my own wrongdoing." My Lords, what is this but saying in plainer language: "My own act was the causa causans of the judgment against me, and Mr. Stephens's omission to be careful was the causa sine qua non." From the moment when the libel was published the appellant was under legal liability, and the effect of the action was merely to ascertain its amount and to compel the appellant to discharge it. If he had been in possession of lost property, belonging to Mr. Comins, and the letter had betrayed to the owner the secret of its whereabouts; if he had encroached on Mr. Lowe's land and the letter had apprised that gentleman of the fact, just before a

H. L. (E.)

1920

WELD-
BLUNDELL
v.

STEPHENS.

Lord Sumner.

H. L. (E.) title accrued by lapse of time ; if he had owed a debt to them
 1920 and the letter had recalled it to their attention, I can hardly
 WELD- suppose that the several judgments recovered could be alleged
 BLUNDELL to be caused by the respondent, even though it was by his
 v. fault that Messrs. Comins and Lowe got at the letter. As
 STEPHENS. Bankes L.J. says : " The damages and costs in question are
 Lord Sumner. payable by reason of the plaintiff's own wrongdoing and were
 legally recoverable from him independently of the defendant's
 breach of his obligation."

As to *Neville v. London Express Newspaper* (1), I confess I should have thought from the report of that case that your Lordships had there laid down a principle which would now be in point, but in deference to the noble Viscount, who was a party to that decision and whose opinion is to the contrary, I forbear to express any concluded judgment upon it.

If, however, the damages, of which evidence was given, were not simply caused by the appellant's publication of the libel, they arose in actions directly and immediately brought about by the intervention of Mr. Hurst. In my opinion the evidence on this point was all one way, and there was nothing to the contrary to be left to the jury. The point was taken in the Court of Appeal, and I am unable to understand why your Lordships are not to decide it now. It is a question of law. The responsibility of Mr. Stephens ended with Mr. Swift, his partner, who was careless but did not drop the letter intentionally. No authority was given by Mr. Stephens to Mr. Hurst in the matter. It was never intended that he should read or make use of the letter. It was no part of his duty to do so. I may add, though I do not think it makes the respondent's irresponsibility any clearer, that Mr. Hurst appears to have involved himself in conversion and detinue of the document and in sundry original publications of the rather complicated collection of libels which it contained. He was an independent actor and a mischief-maker.

It is important to recall exactly what the evidence is as to Mr. Hurst. It is given by Mr. Swift, who was not contra-

dicted nor was his cross-examination directed to shaking his evidence on this point. He received the letter from the respondent for the purpose of making the investigation desired by the appellant. So far there was no breach at all. He dropped it carelessly in Mr. Hurst's room. He discovered that he had lost the letter before Mr. Hurst found it, and he telephoned to him about it. Mr. Hurst looked about the room and replied "There is a letter under the chair in my office where you were sitting." Mr. Swift replied: "Well! It is a private letter! Do not read it! Just put it in an envelope and send it along to me," and Mr. Hurst said, "I will do that straight away." Next day he said, when asked why it had not arrived, "I could not catch the post, because I was detained, but you will get it by the second." This was only a half-truth. What really detained Mr. Hurst was that he was getting a certified copy of the letter made, which was ultimately the foundation of the plaintiffs' case in the actions brought against the appellant.

My Lords, what canon is to be applied to such a case? It is argued that the respondent is liable for any damage, which is "a natural consequence" or "a natural and necessary consequence" of his breach of duty; that the conduct of Mr. Hurst was "under the circumstances probable," and that Mr. Stephens was therefore responsible for it; that the respondent's breach of duty was "the effective cause of the litigation," and that Mr. Hurst's "intervening negligence does not affect" this result.

What are "natural, probable and necessary" consequences? Everything that happens, happens in the order of nature and is therefore "natural." Nothing that happens by the free choice of a thinking man is "necessary," except in the sense of predestination. To speak of "probable" consequence is to throw everything upon the jury. It is tautologous to speak of "effective" cause or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression. Proximate cause has acquired

H. L. (E.)

1920

WELD-
BLUNDELL
v.

STEPHENS.

Lord Sumner.

H. L. (E.) a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result as in *Burrows v. March Gas & Coke Co.* (1) and *Hill v. New River Co.* (2)

As, however, these different epithets and formulæ are used almost indiscriminately, something more must be done than to choose an epithet which has been used in a decided case. It is necessary to consider whether the facts of the case cited raise a question of causation belonging to the same category as that under discussion. The crux of the present question is the intervention of Mr. Hurst between the respondent and Messrs. Comins and Lowe. Further, no want of care has to be proved here against the respondent, for he accepts the decision that he broke his contract by his partner's omission to be careful, though not by any deliberate, intentional or wanton breach. This at once makes it possible to lay aside large classes of authorities. What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation: *Blyth v. Birmingham Waterworks* (3); *Smith v. London and South Western Ry. Co.* (4), per Blackburn J. Again, what ordinarily happens, or may reasonably be expected to happen, is material where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is *Sharp v. Powell* (5), unless indeed it be regarded as a decision on negligence or no negligence. At any rate it is not this case. Again, between the negligence of a defendant and the infliction of hurt or loss on a plaintiff, the action of human beings may intervene

(1) L. R. 7 Ex. 96.

(3) (1856) 11 Ex. 781.

(2) (1868) 9 B. & S. 303.

(4) (1870) L. R. 6 C. P. 14, 21.

(5) (1872) L. R. 7 C. P. 253.

in a great variety of ways, the action of children or other irresponsible creatures, of persons in a state of excusable ignorance acting without any intention to injure others (*Elkins v. M'Kean* (1)); of persons in a state of excusable alarm produced by the wrongful acts of the defendant (*Scott v. Shepherd* (2); *Jones v. Boyce* (3)); of persons acting in the exercise or the defence of their rights and without intention to injure others (*Clark v. Chambers* (4); *The Sisters* (5); *Halestrap v. Gregory* (6)); of persons acting as the defendant meant them to act or acting as the defendant must have foreseen that they would act, in consequence of things done by him for his own purposes or in a state of indifference as to the result to others: *Scott's Trustees v. Moss* (7); *Rex v. Moore*. (8) Mr. Hurst's action is none of these. Equally we may lay aside the cases where dangerous things, or things capable of being dangerous if left exposed to the interference of others, have been treated as imposing special duties of care on those who are responsible for their being left where strangers can make them a source of danger to persons brought into contact with them. Such cases are *Illidge v. Goodwin* (9); and *Lynch v. Nurdin*. (10) Darling J. thought that this case might be treated as if the letter was an "explosive" dangerous in itself and concealing its real character from ordinary examination. The analogy was a false one. The letter could not "go off" of itself. If let alone, it was quite harmless, and Mr. Hurst's only motive for meddling with it must have been either its patent utility for mischief-making or his moral disapproval of Mr. Weld-Blundell's own wrongdoing. There is a special line of cases relating to things supposed to be dangerous in themselves—horses and guns, lamps and hair washes, railway trucks and railway turntables; but a document has been expressly held not to belong to this category: *Le Lievre v. Gould*. (11)

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Lord Sumner

(1) (1875) 79 Penn. Rep. 493.

(2) 2 W. Bl. 892.

(3) (1816) 1 Stark. 493.

(4) 3 Q. B. D. 327.

(5) (1876) 1 P. D. 117.

(6) (1895) 64 L. J. (Q. B.) 415.

(7) 17 R. 32.

(8) 3 B. & Ad. 184.

(9) (1831) 5 C. & P. 190.

(10) (1841) 1 Q. B. 29.

(11) [1893] 1 Q. B. 491.

H. L. (E.) As applied to the present circumstances, what principles and what decisions are in point? The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done, not to inflict punishment for duty disregarded. The trial of an action for damage is not a scientific inquest into a mixed sequence of phenomena, or an historical investigation of the chapter of events by which Mr. Weld-Blundell, the libeller of Messrs. Comins and Lowe, came to be their judgment debtor. It is a practical inquiry, the object of which is to settle the question whether the appellant's payment of damages and costs to these gentlemen was Mr. Stephens's doing, and whether it was Mr. Stephens who made Messrs. Comins and Lowe go to law. If Mr. Weld-Blundell cannot prove that it was so the loss lies where it fell.

In general (apart from special contracts and relations and the maxim *Respondeat superior*), even though A. is in fault, he is not responsible for injury to C. which B., a stranger to him, deliberately chooses to do. Though A. may have given the occasion for B.'s mischievous activity, B. then becomes a new and independent cause—e.g., *Cobb v. Great Western Ry. Co.* (1); *Attorney - General. v. Conduit Colliery Co.* (2) It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B. snaps the chain of causation; that he is no mere conduit pipe through which consequences flow from A. to C., no mere moving part in a transmission gear set in motion by A.; that, in a word, he insulates A. from C. It is quite plain that when Mr. Swift dropped the letter and found out his loss, the matter would have ended there but for the idle hands of Mr. Hurst. He gave the letter a fresh start, and on his original impulse it came to be sued on. Precisely the same result would have happened if the person who dropped the letter in Mr. Hurst's office had previously got it by picking Mr. Swift's pocket. Again, the matter cannot be worse for Mr. Stephens than if he had shown Mr. Hurst the letter himself, that is, had published to him Mr. Weld-Blundell's original

(1) (1894) 63 L. J. (Q. B.) 629.

(2) (1894) 11 Times L. R. 57.

libel. What then? Would the respondent have been liable if Mr. Hurst had republished it (as indeed he did) without authority from him, and not in accordance with any intention or desire on his part, actual or imputable? *Ward v. Weeks* (1) says no. The case is ninety years old, and I see no reason to doubt it. The repetition, says Tindal C.J., was "the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable," and this repetition "was the immediate cause of the plaintiff's damage." Yet, taking men as we find them, few things are more certain than the repetition of a calumny confidentially communicated, even on an honourable understanding of secrecy.

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Lord Sumner.

I gather that the appellant's real argument is this: Why was it the respondent's duty to take care of the letter? Because it contained not only his instructions but several libels. What was the importance of taking care of it as a libel? Because in the hands of others an inconvenient use might be made of it—for example, the person whom the appellant had wronged might be enabled to make him right his wrong. Why should the respondent be concerned with that? Because he might expect that if he lost the letter something of the sort might happen. Why should he expect that such a use might be made of the letter by the finder? Because we must take men as we find them, and we find them as often bad as good. Thus Mr. Hurst's misbehaviour was the natural and probable consequence of Mr. Swift's carelessness.

If there is any basis for this argument, I do not see why it stopped where it did. There can be no doubt that, if Messrs. Comins and Lowe had had the letter sent to them by a person who had stolen it, this action would have failed, even though the respondent had by his carelessness enabled the thief to get access to the letter. Why is the line drawn at Mr. Hurst's conduct? If an expectation that other people will do wrong, when they are given the chance, be the foundation of the respondent's responsibility for what Mr. Hurst did, it would equally extend to the conduct of a criminal.

H. L. (E.) The importance of the point is this. It is said that the jury's
 1920 third finding is conclusive because there was evidence to go
 WELD- to the jury which would support it. This evidence is either
 BLUNDELL the respondent's admission above quoted, that he realized
 v. that the letter was dangerous, or it is the general effect of the
 STEPHENS. circumstances of the case as a jury would regard them. I
 Lord Sumner. cannot see that there is any evidence in law in either case,
 because I cannot see that the mere probability that actions
 might be brought for the libels can turn Mr. Hurst's act into
 the respondent's act. It might be material if the question
 of want of care were in dispute, but it is not. Remoteness
 of damage is a question of cause and effect, a different question.
 That a jury can finally make A. liable for B.'s acts merely
 because they think it was antecedently probable that B.
 would act as he did apart from A.'s authority or intention
 seems to me to be contrary to principle and unsupported by
 authority.

* I turn to the cases cited by the appellant. They certainly
 do not determine the present question nor does it seem to me
 that *Clark v. Chambers* (1) at any rate is a decision on the
 measure of damage or on the causal connection between the
 wrong act done and the wrong suffered at all. What the
 defendant Chambers there did was deliberately done for his
 own purposes in disregard of the rights of others generally,
 and what the intervening party did was in defence of his
 rights and not obviously dangerous to others. When the
 reasoning is summed up by the Court, stress is laid on the
 fact that the defendant's act was a deliberate and unlawful
 obstruction of a right of way, and no fewer than three grounds
 are stated for the decision: (1.) that it is covered by *Scott v.*
Shepherd (2), a case which has no bearing on the present appeal;
 (2.) that the defendant, when he laid this trap, must have
 anticipated that some one entitled to use the road would abate
 the nuisance he had created, and took the risk of it; and
 (3.) that there was a duty upon him to safeguard others from
 the effects of anything that might lawfully be done in removing
 his obstruction. I think many persons have felt difficulty

(1) 3 Q. B. D. 327, 338.

(2) 2 W. Bl. 892.

in fitting *Clark v. Chambers* (1) into any coherent relation with the rest of the law on this subject. Lindley L.J., for example, in *The Bernina* (2) is fain to treat it as a case of joint concurrent negligence of the defendant, who should have provided a light, and of the person who moved the chevaux de frise and left it in the dark. No difficulty need be felt now in saying that the case has no place in the present argument. *Bowen v. Hall* (3) is a case in which the third party's act, rightful or wrongful, was precisely what the defendant intended to bring about. The point argued was that the third party's act was in itself wrongful, and for that reason only was too remote, which is not the point here. *Engelhart's Case* (4) should be read with *McDowall's Case* (5), for the latter purports to follow the principle, whatever it is, of the former. Both relate to responsibility for the intervention of irresponsible young persons. In the former stress is laid on the zeal of the lad, who officiously started the horse, thinking that he was doing his master a service though in disregard of his orders. Even so, the case is said to be on the border line, and Lopes L.J. says the liability would have been the same if no one had been left with the horse and an entire stranger had started it, which clearly shows that he conceived the case to depend on the special responsibility of those who leave animals unattended in public places. Unless the decision really turns, as argued by counsel and held by Lord Esher, on the continuing negligence of the man, who ought to have remained in charge of the horse all the time and whose omission was an effective cause concurrent with the boy's officious interference with the horse, and so follows *Illidge v. Goodwin* (6), I think the case was insufficiently considered, and, when necessary, should be prepared to review it. In *McDowall's Case* (5) on the contrary the railway company was exonerated from responsibility for what was held to have been due to the intervening action of others, though it had just as much reason to anticipate what

H. L. (E.)

1920

WELD-
BLUNDELL
v.
STEPHENS.
Lord Sumner.

(1) 3 Q. B. D. 327, 338.

(2) (1887) 12 P. D. 58.

(3) 6 Q. B. D. 333.

(4) [1897] 1 Q. B. 240.

(5) [1903] 2 K. B. 331.

(6) 5 C. & P. 190.

H. L. (E.) happened as the present respondent had, and perhaps more, for the intervening agents were young boys. *De la Bere v. Pearson* (1) turns on the implications of the particular contract. It was more than a mere contract to use care; it approximated to a warranty of the fitness of an article supplied. What the defendant had agreed to do was to recommend an honest inside broker; he recommended an outside broker, who was a rogue, and the consequences of his roguery were held to be covered by the contract as construed.

Great stress was laid on Lord Wensleydale's language in *Lynch v. Knight* (2), namely, "to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words." It must be remembered what *Lynch v. Knight* (2) was. The defendant had been guilty of making deliberate and continued accusations against his step-sister to her husband, obviously intending to produce some effect on him adverse to her. Lord Campbell wrote of him, "he having intended the husband to believe that it was true, and having intended the husband to act upon it." (3) Thus the first question was, whether what the husband did was within the class of action he was intended to take, or arose from some "idiosyncrasy of the particular husband." If it was the former, the defendant's further argument was, that as the husband was not in law bound to put her away in consequence nor was warranted in doing so, this particular consequence was not special damage. One must read Lord Wensleydale's words with reference to this argument. I do not think he would have spoken of "human nature with its infirmities" in connection with Mr. Hurst, for that would be stretching charity into condonation, nor is there any evidence of any relationship between Mr. Hurst and Messrs. Comins and Lowe beyond the fact that he knew who they were. Lord Wensleydale's view was that

(1) [1908] 1 K. B. 280.

(2) 9 H. L. C. 577, 600.

(3) 9 H. L. C. 590.

what Lynch intended Knight to do would extend to what any reasonable man would have feared that he would do, but this was not part of the decision, nor is it applicable to this case, for here the respondent had no such intention as Lynch had. Their Lordships all concurred in rejecting the argument that the husband's conduct could not be material unless it was his legal right or duty to act as he did, but they held that the defendant must succeed because it was not reasonable for the husband to have taken so serious a course on an imputation of mere "levity of manners" requiring only vigilance on his part. The passage in question is, therefore, no warrant for the proposition which the appellant founds on it. The contention is not raised here that Mr. Stephens escapes liability for Mr. Hurst's acts merely because they were tortious, or that Mr. Hurst stood in any special relationship to Messrs. Comins and Lowe. The bare unqualified contention is that the defendant is liable, as for the consequences of his partner's carelessness, for anything done by Mr. Hurst, which, taking men as we find them, a jury might think it natural for Mr. Hurst to do. This proposition, if right, makes a clean sweep of a vast body of decided cases, as mere indications of which I need only mention *Parkins v. Scott* (1) and *Bree v. Marescaux* (2), for more than half of human kind are tale-bearers by nature, and a good many people "naturally" take advantage of any opportunity to be dishonest, if they see anything to be got by it.

My Lords, I think the appeal fails and should be dismissed with costs, and as the point relating to the decision of the Court of Appeal to deprive the appellant of his costs of the action has not been argued, I think the judgment of the Court of Appeal should be upheld.

LORD PARMOOR. My Lords, the appellant, on May 4, 1915, wrote to the respondent a letter instructing him to investigate the affairs of the Float Electric Company. This letter contained libellous statements referring to Lowe, a previous manager of the company, and to Comins, the auditor, which,

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
←
Lord Sumner.

(1) 31 L. J. (Ex.) 331.

(2) 7 Q. B. D. 434.

H. L. (E.) on the subsequent trial on a libel action, were held to be
 1920 malicious. The respondent handed the letter to his partner,
 WELD- who dropped or left it in the room of the manager, Hurst, at
 BLUNDELL the offices of the Float Company. The manager found and
 v. read the letter and communicated its contents to Lowe and
 STEPHENS. Comins, who brought actions of libel against the appellant,
 Lord Parmoor alleging as the publication, the publication to the respondent.
 The plaintiffs succeeded in both actions, the judge ruling that
 the occasion was privileged, but the jury finding that the
 appellant had acted maliciously. The sum paid by the
 appellant for damages and costs amounted to 1679*l.* 14*s.* 8*d.*

The appellant then commenced an action against the
 respondent, charging him that he had broken an implied term
 in his contract of employment, to use reasonable care to
 keep secret the contents of the said letter, and basing his claim
 for damages on the sums which he had had to pay for damages,
 and costs in the libel actions. The action was tried before
 Darling J., and the jury found:—

“(1) That it was the duty of the defendant to keep
 secret the letter of May 4th, written by the plaintiff to the
 defendant.

“(2) That the defendant had neglected his duty in regard
 to the said letter, so that the contents were disclosed or
 came to the knowledge of Mr. Hurst.

“(3) Damages 650*l.*, on the ground that the plaintiff
 himself was responsible to some extent for the damages
 awarded in the libel actions.”

These findings are not questioned in the appeal, and in my
 opinion they are not open to discussion in this House. On
 further consideration, Darling J. held that the injuries sustained
 by the appellant were traceable to his own unlawful act,
 and that the maxim “*Ex turpi causa non oritur actio*” applied,
 and further that the plaintiff could not recover damages
 against another because he had had to make reparation for a
 wrongful act committed by himself. At the same time the
 learned judge expressed his agreement with the finding of the
 jury: that the bringing of the libel actions, and the resulting
 loss to the plaintiff, were the natural consequence of the

defendant's negligent disclosures. The Court of Appeal were unanimous in deciding that the appellant had a good cause of action against the respondent, and held by a majority that only nominal damages were recoverable. The only question raised in debate before your Lordships is, whether nominal damages are alone recoverable.

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Lord Parmoor.

My Lords, the decision of the Court of Appeal affirms the proposition that there is in law no objection to an obligation undertaking not to disclose a libellous document, where the libellous document is not criminal in character, and the party who undertakes the obligation is not in the position of a joint tortfeasor. In my opinion this carries the appellant a long way, and the question of damages must be carefully dissociated from the question of a right of action. If the respondent had been in the position of a joint tortfeasor, he would not have been liable in the action, and the question which arises in this appeal, as to whether more than nominal damages are recoverable, would not have arisen. This decision, however, leaves open the question whether an obligation to indemnify a plaintiff against a liability consequent on the disclosure of his own wrong is an obligation which may be enforceable at law.

This issue is directly raised where damages are claimed on the basis of the damages and costs incurred in any libel action or actions which have resulted from the disclosure by an agent of libellous documents entrusted to him for safe custody. On this point Scrutton L.J. formed a different conclusion from Bankes and Warrington L.JJ., and the case is one of great difficulty.

The first matter for consideration is whether the obligation undertaken by the respondent was intended by the parties themselves to include such a liability for damages in the event of the negligent disclosure of the libellous document. With some hesitation I have formed the opinion that this question should be answered in the affirmative. I agree with Darling J. that, subject to the objection of law, which does not appear to me to have been present to the mind of either party when the contract was made, the damages

H. L. (E.) 1920
 WELD-
 BLUNDELL
 v.
 STEPHENS.
 Lord Parmoor.

claimed are, as found by the jury to be, the natural and probable result of the negligent disclosure. Apart from such damages, there was no suggestion during the course of the trial that loss and expense had been incurred by the appellant. I should further be prepared to find, if necessary, that the damages, as claimed, were within the contemplation of the parties when the contract was made. That there is no general objection to a contract in this form is evidenced by such a case as *Agius v. Great Western Colliery* (1), where the unsuccessful defendant recovered, as damages for breach of contract, both the damages awarded against him in an action resulting from that breach, and the costs of his unsuccessful defence: the judge at the trial finding that the course taken by the plaintiff in defending the action against him was reasonable.

The objection, however, taken on behalf of the respondent, is that it is not material that the damages awarded have been found to be the natural and probable result of the breach of the contract, or that they were within the contemplation of the parties at the time of entering into the contract, seeing that they are not legally recoverable on the principle stated by Darling J.: "Can one recover damages against another because he has had to make reparation for the wrongful act committed by himself?" Or to put the question in a different form, are damages, which would otherwise be recoverable, as being the natural result of a breach of contract, or as being within the contemplation of the parties, incapable of being recovered because they are founded on the costs incurred to make reparation for a wrongful act committed by himself? If this principle is applicable, then it follows that the damages and costs incurred in the libel actions would not be recoverable by the appellant, although the contract should contain an express promise of indemnity from the respondent. This position was not contested in the able argument on behalf of the respondent.

My Lords, I think that the proposition stated in this general language is too wide, and that there are circumstances in

(1) [1899] 1 Q. B. 413.

which an indemnity can be claimed against a wrongful act of a plaintiff which is not either criminal or wilful in its character. With this limitation in mind, I should be content to take the law as laid down by Kennedy J. in the case of *Burrows v. Rhodes* (1): "It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void. . . . Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to claim contribution or indemnity appears to me to be clear." Does the libellous document, intrusted to the respondent, which was in itself privileged, but which was found to be malicious, come within an act "manifestly unlawful, or which the doer of it knows to be unlawful"? There appears to be no direct authority, but Scrutton L.J. expresses the opinion: "I cannot say that Mr. Weld-Blundell must be taken to have known that he was committing an unlawful act, so as to lose all protection if the letter was revealed." In other words, the learned Lord Justice finds that the wrong was not wilful, and comes within the category of cases in which a plaintiff can legally claim indemnity against his own negligent act or the negligent act of those for whom he is responsible. In *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.* (2), the negligent navigation was held not to defeat a claim to recover on a marine insurance policy, although such negligent action had directly conduced to the collision, but it is indicated that the conclusion would have been different if the negligence had been wilful. The same principle applies in the case of fire policies, with the same distinction between negligence and a wilful act. In *Cointat v. Myham* (3) a claim for damage was allowed in respect of a fine and costs, as well as for a loss of trade. On the other hand, in the case of *Leslie v. Reliable*

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Lord Parmoor.

(1) [1899] Q. B. 816, 828.

(2) [1898] 2 Q. B. 114.

(3) [1913] 2 K. B. 220.

H. L. (E.) *Advertising Agency* (1), it was held that, as the plaintiffs had been convicted of sending a money-lending circular, without having reasonable grounds for believing the addressee to be of full age, the claim was not maintainable. I desire in the present appeal to express no opinion as to what the legal result would be in a case in which damages in the nature of an indemnity for a criminal act are sought to be recovered. In such a case questions of public policy would arise which do not arise in the present appeal. On the whole I agree with the judgment on this point of Scrutton L.J., and, apart from authority, I can see no reason why, if the action is maintainable, damages in the nature of an indemnity should not be recovered, if such damages can be regarded either as the natural and probable result of the negligence, or as in the contemplation of the parties when they entered into the contract.

It was further contended on behalf of the respondent that the damages were too remote, in that the actions for libel were directly attributable not to the negligence of the respondent, but to the action of Hurst in disclosing the libellous document to Lowe and Comins. This point was not raised at the trial before Darling J., and is not referred to in the judgment of the Court of Appeal, but the intervening negligence of a third party does not necessarily in law render the negligence too remote, and if it had been intended to raise this point it should have been raised at the trial of the action so that the necessary relevant question might have been left to the jury. It is sufficient to refer to the case of *Engelhart v. Farrant* (2), in which the defendant was held to be liable where the negligence of his driver in leaving a cart was the effective cause of the damage, when in his absence a lad drove on, and came into collision with the plaintiff's carriage. This principle was recognized in the case of *McDowall v. Great Western Ry. Co.* (3), although it was held in that case that the evidence did not support the finding of the jury, and that the negligence of the defendants was not the effective

(1) [1915] 1 K. B. 652.

(2) [1897] 1 Q. B. 240.

(3) [1903] 2 K. B. 331.

cause of the accident. I would refer also to the cases of *H. L. (E.) Clark v. Chambers* (1); *Bowen v. Hall* (2); and *Lynch v. Knight*. (3) 1920

WELD-
BLUNDELL
v.
STEPHENS.

In my opinion the judgment of the Court of Appeal should be reversed and judgment entered for the appellant for the amount of the verdict.

LORD WRENBURY. My Lords, by his letter of May 4, 1915, the plaintiff Weld-Blundell published to the defendant Stephens with express malice a libel upon certain persons, including Lowe and Comins. The relevant facts for the moment stop there. Whether Lowe and Comins knew it or not, there existed by reason of those facts a cause of action against Weld-Blundell at the suit of each of them. He lay under a legal obligation to pay damages for his wrongful act. They subsequently learned that they had this cause of action. Each of them sued and recovered damages and costs. Those damages were, of course, the pecuniary equivalent of the wrong done to the parties libelled. Weld-Blundell in those actions suffered no damage at all. He had to pay money, but a defendant is in no sense damaged by being compelled by legal process to satisfy his legal obligation.

In that state of facts Weld-Blundell, in the present action, seeks to recover from Stephens the money he has had to pay to Lowe and Comins. He is entitled, he says, to recover it because Stephens, in breach of duty to him, did such acts as that Lowe and Comins became aware that they had the above right of action. If Stephens had not committed that breach of duty Lowe and Comins would not have known that they had, or might not have known that they had, and would not have exercised their right of action, and Weld-Blundell would not have been compelled to pay money. He is damaged, he says, by the amount of money he has had to pay, and Stephens is liable to him in the amount of damages and costs in the libel actions as damages for Stephens's negligence and breach of duty.

(1) 3 Q. B. D. 327.

(2) 6 Q. B. D. 333.

(3) 9 H. L. C. 577, 600.

H. L. (E.) My Lords, there is, in my judgment, more than one answer to this contention.

1920
WELD-
BLUNDELL
v.
STEPHENS.
Lord Wrenbury.

The relations between Weld-Blundell and Stephens were such that the latter no doubt owed a duty to the former, and in that duty he was negligent. Weld-Blundell's liability to pay money to Lowe and Comins, however, arose not from that negligence, but from his own wrongful act in indulging in malicious libel. And the amount he had to pay was measured by his own wrongful act. It bore no pecuniary relation to Stephens's wrongful act. Stephens's act was not the cause (whether with or without the word "effective") of his having to pay, but was an act without which possibly he would never have been called upon to pay. It was not *causa causans* but at most *causa sine qua non*.

In discharging his liability to pay damages for malicious libel Weld-Blundell suffered no damage at all. A man is not damnified by being compelled to satisfy his legal obligation. In *Neville v. London Express Newspaper* (1) the House were unanimous upon this proposition.

Further, the following passage in the judgment of Kennedy J. in *Burrows v. Rhodes* (2) correctly, in my judgment, states the law :—

"It has, I think, long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise or indemnity to him for the commission of such an act is void."

In support of this proposition he cites *Shackell v. Rosier* (3); *Arnold v. Clifford* (4); and *Martyn v. Blithman*. (5)

In the present case Weld-Blundell did an unlawful act in libelling Lowe and Comins. He cannot by legal process reimburse himself for the consequences and throw the cost upon another.

(1) [1919] A. C. 368.

(2) [1899] 1 Q. B. 816, 828.

(3) 2 Bing. N. C. 634.

(4) (1835) 2 Sumner's Circuit Court Reports U.S. 238.

(5) (1611) Yelv. 197.

Further, notwithstanding what was said by Kelly C.B. in *Riding v. Smith* (1), I think *Ward v. Weeks* (2) is good law. "There is ample authority," said Bramwell L.J. in *Bree v. Marescaux* (3) "to shew that a man is not liable for damage occasioned by a repetition of the slander; that is to say, if A. said to B. that C. stole his sheep, though A. would be liable to C. for such slander, yet if B. repeat this slander, A., the original speaker, would not be responsible for this." See also Lindley J. in *Clarke v. Morgan*. (4) The proposition thus stated, however, requires, I think, qualification. If, for instance, A. expressly authorized B. to repeat the slander, or if from the surrounding circumstances it is to be inferred that he anticipated and wished that he should repeat it, the proposition would not, I think, be true: *Speight v. Gosnay* (5); *Ratcliffe v. Evans*. (6)

H. L. (E.)
1920
WELD-
BLUNDELL
v.
STEPHENS.
Lord Wrenbury.

The present case is not one of slander, but of libel. But not only had Weld-Blundell not authorized Stephens to repeat the libel, he had sent him the letter containing the libel under such circumstances that he (Stephens) owed him the duty not to disclose it. Assuming that it can be said that Stephens made publication to Lowe of the libel on Comins and made publication to Comins of the libel on Lowe, nothing results from this, for: (1.) Weld-Blundell was not liable in respect of that publication which he had not authorized, and (2.) he was made liable not for that publication, but for the publication made by Weld-Blundell to Stephens, and the last-mentioned publication had been made and its consequences incurred before the events happened, that Swift dropped the letter and Hurst picked it up and wrongfully read it, and as a result Lowe and Comins were informed. Nothing that Stephens did created the liability under which Weld-Blundell lay. I am quite unable to follow the proposition that the damages given in the libel actions are in any way damages resulting from anything which Stephens did in breach of duty.

And if it be worth while to pursue it further, that which

(1) 1 Ex. D. 91, 94.

(2) 7 Bing. 211.

(3) 7 Q. B. D. 434, 437.

(4) (1877) 38 L. T. 354.

(5) 60 L. J. (Q. B.) 231.

(6) [1892] 2 Q. B. 524, 530.

H. L. (E.) Stephens did in breach of duty was not that he informed
1920 Lowe and Comins, but that he negligently gave Hurst the
WELD- opportunity to commit another wrongful act—namely, that of
BLUNDELL reading the letter—an opportunity of which he wrongfully
v. STEPHENS. availed himself, and then did the act of informing Lowe and
Lord Wrenbury. Comins.

My Lords, we have heard little, and I have so far said nothing, as to the question discussed below and on which the Court of Appeal expressed an opinion—namely, whether the duty (although the Court of Appeal call it a contract) found by the jury to keep secret the letter of May 4 was contrary to public policy. All the Lords Justices held that it was not. I fully agree. The contrary proposition would seem to be that public policy requires that a man should spread a malicious libel to the best of his ability, or at least that he should inform the party libelled (if he does not already know it) in order that he may be induced to bring an action. I do not think public policy requires anything of the kind.

In my judgment the order under appeal is right. There was a duty: there was negligence: there was no special damage. The damages are nominal. I think the appeal should be dismissed with costs.

*Order of the Court of Appeal, in part complained
of, affirmed and appeal dismissed with costs.*

Lords' Journals, May 13, 1920.

Solicitors for the appellant: *J. S. Blanckensee & Co.*

Solicitors for the respondent: *Guedalla, Jacobson & Spyer.*

[HOUSE OF LORDS.]

H. L. (E.)*

BOURTON APPELLANT ;

1920

May 17

AND

BEAUCHAMP AND ANOTHER RESPONDENTS.

Workmen's Compensation—Fatal Accident—Arising out of and in Course of Employment—Disobedience to Statutory Regulations—Sphere of Employment—Added Peril—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), ss. 61, 86—Explosives in Coal Mines Order, September, 1913, Part I., paras. 2 (c), 3 (c)—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-ss. 1, 2 (c).

A miner employed to get coal by pick or shot firing, on arriving at the coal face, saw a hole already drilled and stopped with stemming and the charred remains of a fuse. He proceeded to remove the stemming with a view to laying a fresh shot in the same hole when an explosion occurred which caused his death. The hole had been charged two days before, but the shot had missed fire. The use of explosives at the mine was regulated by statutory regulations made under the Coal Mines Act, 1911, which provided that when a hole had been charged no part of the stemming should be removed, and that if a shot misfired a second charge should not be placed in the same hole. Upon a claim for compensation under the Workmen's Compensation Act, 1906, by the widow of the deceased:—

Held, that the deceased, in disobeying the statutory regulations, was acting outside the sphere of his employment, and that consequently his death was not caused by accident arising out of and in the course of his employment.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal setting aside an award of the judge of the Bath County Court under the Workmen's Compensation Act, 1906.

The appellant claimed compensation from the respondents for the death of her husband, Albert Bourton.

The following statement of facts is taken from the opinion of Viscount Cave: "The deceased was a collier and certificated shot firer who was employed by the respondents at the Farrington Collieries to get coal either by a pick or by shot firing. On the 19th of February, 1918, a man named West,

* *Present*: VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

H. L. (E.) who was employed at the same mine, charged a hole in the coal face with explosive shot. This he connected with a fuse and stopped the mouth of the hole with stemming. He lighted the fuse but the shot missed fire, leaving the stemming intact and leaving some charred remains of the fuse outside the stemming. West entered in a book containing the record of shots which was kept in the candle house the fact of the shot having missed fire, but did not, as the regulations required, report the fact to the manager or under-manager. On the 21st of February the deceased went with other men to get coal at the same place. Before arriving at the spot he was unaware of the existence of the hole and the unexploded shot; but on arrival he must have seen the stemming and burnt fuse, for he proceeded to drill out some of the stemming with a view to laying a fresh shot in the same hole. Unprotected lights are used in this colliery, and the deceased had a lighted candle in his cap. On the stemming being removed an explosion occurred which caused grave injury to the deceased and others; and in the case of the deceased septic pneumonia supervened, and he died on the 15th of March."

The respondents denied liability on the ground that Bourton's death was not caused by accident arising out of and in the course of his employment, inasmuch as the deceased at the time of the explosion was acting in contravention of the provisions of the Coal Mines Act, 1911, and of the rules and regulations made thereunder.

The use of explosives at the respondent's mine was regulated by the Explosives in Coal Mines Order, September, 1913, made by the Secretary of State under s. 61 of the Coal Mines Act, 1911, and General Regulations dated July 10, 1913, made under s. 86 of the Act.

The Explosives in Coal Mines Order, Part I., provides (para. 2 (c)) that when a hole has been charged the explosive shall not be unrammed nor shall any part of the stemming be removed; (para. 3 (c)) that if a shot misses fire a second charge shall not be placed in the same hole; (para. 3 (e)) that except where the misfire is due to a faulty cable or a

faulty connection another shot shall be fired in a fresh hole which shall be drilled not less than twelve inches away ; (para. 3 (i)) that the person firing the shot shall report the circumstance to the manager or under-manager without delay.

H. L. (E.)
1920
BOURTON
v.
BEAUCHAMP.

The county court judge found as a fact that the deceased in removing the stemming did so for the purpose of getting coal and that the deceased thought, although without reasonable ground, that the shot had been fired, and he, being of opinion that para. 2 (c) of the order did not limit the sphere of the deceased's employment, made an award in favour of the appellant.

The Court of Appeal (Swinfen Eady M.R., Warrington and Duke L.J.J.) set aside this award and made an award in favour of the respondents upon the ground that the deceased at the time of the accident was acting outside the sphere of his employment.

May 14, 17. *Harold Morris* (with him *Slessor*) for the appellant. Regs. 2 (c) and 3 (c) of the Explosives in Coal Mines Order do not limit the sphere of the workman's employment, but are directions how the work which he is employed to do is to be done. The deceased was employed to get coal at the face ; he was doing that all the time, but he did it in a prohibited way. *Harding v. Brynddu Colliery Co.* (1) is an analogous case. The question is, to use the language of Earl Loreburn in *Barnes v. Nunnery Colliery Co.* (2), whether what the workman was doing imprudently or disobediently was "different in kind from anything he was required or expected to do." Here the deceased's work was to break up the coal and that is what he was doing in fact. *Chilton v. Blair & Co.* (3) is in point.

[The following cases were also referred to : *Plumb v. Cobden Flour Mills Co.* (4) ; *Brice v. Edward Lloyd* (5) ; *Watkins v. Guest, Keen and Nettlefolds* (6) ; *Herbert v. Samuel Fox & Co.* (7)]

(1) [1911] 2 K. B. 747.

(2) [1912] A. C. 44, 47.

(3) (1914) 7 B. W. C. C. 607 ;
(1915) 8 B. W. C. C. 324.

(4) [1914] A. C. 62.

(5) [1909] 2 K. B. 804.

(6) (1912) 5 B. W. C. C. 307.

(7) [1916] 1 A. C. 405.

H. L. (E.) *Inskip K. C. and W. Shakespeare* for the respondents were
1920 not called on.

BOURTON
v.
BEAUCHAMP.

VISCOUNT CAVE. My Lords, this appeal has been very well argued, but I understand that your Lordships do not desire to hear counsel on behalf of the respondents.

The appeal is by the widow of Albert Bourton from an order of the Court of Appeal in England allowing an appeal from an award of compensation in respect of the death of her late husband made by His Honour Judge Gwynne James, under the Workmen's Compensation Act, 1906. [His Lordship stated the facts.] The learned county court judge has found that the deceased when he removed the stemming had no reasonable ground for believing that the charge had exploded, but that in fact he did so believe. I agree with the learned judges in the Court of Appeal in thinking that there was no evidence on which he could come to that conclusion; but in any case it is plain that the deceased saw the hole, the stemming and the fuse and knew that the hole had been charged. At the hearing in the county court it was admitted that the deceased in removing the stemming acted contrary to the regulations contained in the Explosives in Coal Mines Order of September 1, 1913, which, under s. 86, sub-s. 4, of the Coal Mines Act, 1911, have effect as if enacted in the Act. Of these regulations r. 2 (c) provides that "No explosive shall be forcibly pressed into a hole, and, when a hole has been charged, the explosive shall not be unrammed nor shall any part of the stemming be removed nor shall the detonator leads be pulled out." Rule 3 provides that "If a shot misses fire: . . . (c) A second charge shall not be placed in the same hole"; and (e) "Except where the misfire is due to a faulty cable or a faulty connection, and the shot is fired as soon as practicable after the defect is remedied, another shot shall be fired in a fresh hole which shall be drilled not less than twelve inches away from the hole in which the shot has missed fire, and shall, as far as practicable, be parallel with it." The act of the deceased was in violation of all these regulations.

A claim for compensation having been made by the appellant, the learned county court judge held that the accident arose out of and in the course of the deceased's employment and awarded compensation. He expressed his opinion that reg. 2 (c) did not limit the deceased's sphere of employment but gave directions as to working within the sphere of his employment. It appears from a note to the award that his attention was not called to the important reg. 3 (c) until after he had given his award. On appeal the Master of the Rolls (Sir C. Swinfen Eady), Warrington and Duke L.JJ. unanimously came to the opposite conclusion; they held that the injury did not arise out of the deceased's employment but through an added risk which he was forbidden by the statutory regulations to run, and accordingly allowed the appeal. Thereupon this appeal was brought.

H. L. (E.
1920
BOURTON
v.
BEAUCHAMP.
Viscount Cave.

My Lords, questions as to the limitation by statutory and other directions of the sphere of a workman's employment have been considered by this House in a number of cases of which some of the most recent are *Barnes v. Nunnery Colliery Co.* (1); *Chilton v. Blair & Co.* (2); *Plumb v. Cobden Flour Mills Co.* (3); *Herbert v. Samuel Fox & Co.* (4); *Lancashire and Yorkshire Ry. Co. v. Highley* (5); and *Campbell or Robertson v. Woodilee Coal and Coke Co.* (6) (decided on March 22, 1920, affirming a decision reported in 56 S. L. R., p. 498). These decisions show that the question to be determined in each case of this character is whether the act which caused the injury arose out of and in the course of the employment, or was one outside the employment altogether. If the former is the case and death or serious and permanent disablement results, then under the Workmen's Compensation Act, 1906, s. 1, sub-s. 2, there is a right to compensation even though the injury was attributable to the serious and wilful misconduct of the worker; but if the act was wholly outside the sphere of employment, then the Act has no application

(1) [1912] A. C. 44.

(3) [1914] A. C. 62.

(2) 7 B. W. C. C. 607; 8 B. W. C. C.

(4) [1916] 1 A. C. 405.

324.

(5) [1917] A. C. 352.

(6) [1920] W. N. 138.

H. L. (E.) and compensation cannot be awarded. The distinction, as
 1920 Viscount Finlay pointed out in *Highley's Case* (1), may be
 BOURTON a fine one, but it is a real distinction. There is a substantial
 v. difference between doing carelessly or recklessly a thing
 BEAUCHAMP. which you are employed to do, and doing a thing which you
 Viscount Cave. are not employed or entitled to do at all. The former risk
 is undertaken by the employer in cases falling within the
 statute; the latter is a peril added by the workman and not
 within the contemplation of the parties to the contract of
 employment.

The test has been put in different ways. In *Barnes's Case* (2)
 Lord Atkinson said: "The unfortunate deceased in this
 case lost his life through the new and added peril to which
 by his own conduct he exposed himself, not through any
 peril which his contract of service, directly or indirectly,
 involved or at all obliged him to encounter. It was not,
 therefore, reasonably incidental to his employment. That
 is the crucial test." In *Plumb's Case* (3) Lord Dunedin,
 while pointing out that the question to be answered is always
 a question arising upon the very words of the statute—that is,
 whether the injury arose out of or in course of the man's
 employment—repeated a phrase which he had used in the case
 of *Conway v. Pumpherson Oil Co.* (4) in the Court of Session—
 namely, that "there were two sorts of ways of frequent
 occurrence in which a workman might go outside the sphere
 of his employment—the first, when he did work which he
 was not engaged to perform, and the second, when he went
 into a territory with which he had nothing to do"; and
 the noble and learned Lord quoted with approval the sentence
 which I have cited from Lord Atkinson's judgment in
Barnes's Case. (5) Again in *Highley's Case* (6) Lord Sumner
 put the matter in this way: "I doubt if any universal test
 can be found. Analogies, not always so close as they seem to
 be at first sight, are often resorted to, but in the last analysis
 each case is decided on its own facts. There is, however,

(1) [1917] A. C. 352.

(2) [1912] A. C. 50.

(3) [1914] A. C. 66.

(4) 1911 S. C. 660.

(5) [1912] A. C. 44

(6) [1917] A. C. 372.

in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this : Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury ? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury."

H. L. (E.)
1920
Bourton
v.
Beauchamp
Viscount Cave.

My Lords, if these tests or any one of them be applied to the present case, the result must be unfavourable to the appellant. The deceased was not doing a permitted act carelessly ; he was doing an act which he was prohibited from doing by statutory provisions which attached to his employment and which by those provisions was expressly excluded from his employment. He was neither engaged nor entitled to open up a hole which had been previously charged, and his doing so cannot therefore have been reasonably or at all incidental to his employment. It was no part of his employment to hazard or to do that which caused his injury, and the hazard was an added peril consequent on his own extraneous act. In my opinion, therefore, the injury here in question did not arise out of or in the course of the employment of the deceased within the meaning of the Act, and the claim to compensation fails.

It is impossible not to feel sympathy with the appellant ; but, as has been said in previous cases, an ill service would be done to the general body of workmen employed in mines if, owing to any such feeling, a decision were given which would weaken or undermine the regulations which have been imposed

H. L. (E.) for securing so far as possible the safety of those who are
1920 engaged in this dangerous employment.

BOURTON For these reasons I am of opinion that this appeal fails
v.
BEAUCHAMP, and should be dismissed with costs, and I move your Lordships
accordingly.

LORD DUNEDIN. My Lords, I concur. In the matter of authority I do not think that really there is more to be said than is to be found in the cases which have been mentioned by the noble and learned Viscount upon the Woolsack. The application to the particular facts of a case may be difficult and may give rise to difference of opinion between different minds. As regards this case I have not felt any doubt, and I only wish to say further that I desire particularly to associate myself respectfully with the remarks that were made by my noble and learned friends Lord Atkinson and Lord Shaw in the case of *Herbert v. Samuel Fox & Co.* (1) as to the disservice which would be done by treating as matters of nonentity these statutory rules.

LORD ATKINSON. My Lords, in my opinion this is a plain and simple case. It is not at all a case where a workman has done negligently some work which he was employed to do. It is a case where the workman has done a thing that he is by statute—for the regulations have the force of statute—forbidden to do, to effect an object which by the same statute he is forbidden to effect. He is forbidden by statute to withdraw stemming from a hole already charged; he is forbidden also by statute to fire a shot in a hole which has been already charged, and really it passes my comprehension how a certain act can be more effectually put outside the sphere of a workman's employment than by a statutory prohibition which says that he shall not do that work.

I think it is perfectly clear that this thing which this unfortunate man did was outside the sphere of his employment, and I only wish to say in passing, what it ought to be hardly necessary to say, that wilful misconduct does not bring

(1) [1916] 1 A. C. 405.

within the sphere of a workman's employment a work or H. L. (E.)
 an act which apart from that misconduct would have been 1920
 outside it. The provision with regard to serious and wilful BOURTON
 misconduct has really no application until you first get the v.
 act in the doing of which serious and wilful misconduct has BEAUCHAMP.
 been committed inside the sphere of his employment. Lord Atkinson.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

LORD SUMNER. My Lords, I agree.

*Order of the Court of Appeal affirmed and
 appeal dismissed with costs.*

Lords' Journals, May 17, 1920.

Solicitors for the appellant : *Church, Adams, Prior & Balmer,*
for Arthur E. Withy, Bath.

Solicitors for the respondents : *Calder Woods & Pethick, for*
F. E. Metcalfe, Bristol.

J. C.*
1919†
Aug. 5.

[PRIVY COUNCIL.]

AUGER AND OTHERS APPELLANTS ;
AND
BEAUDRY AND OTHERS RESPONDENTS.
ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC,
APPEAL SIDE.

Canada (Quebec)—Will—Construction—Children of deceased Child—Substitution—Representation—Civil Code of Quebec, art. 980.

A deceased resident in the Province of Quebec by his will gave to each of four of his children (all of whom survived the testator) the usufruct during life of specified parts of his property ; the will further provided that in the event of the death without issue of any of the four children his or her part in the testator's property should return to the survivors of them "leur vie durant, et pour la propriété d'icelle part appartenir à leurs enfants . . . et par souches" :—

Held, that the beneficiaries upon the death without issue of one of the testator's four children did not include the children of one of them who had died before that event.

Judgment of the Court of King's Bench affirmed.

APPEAL from a judgment of the Court of King's Bench, Appeal Side (February 28, 1918) affirming, subject to a variation, the judgment of Monet J.

The action was brought by the respondent Corinne Herminie Beaudry, the widow of Rouet Roy K.C., in the Court of King's Bench for the Province of Quebec, claiming a declaration of her rights under the will of her deceased father upon the death without issue of her sister, the wife of Lionel Gardiner. The facts, including the material provisions of the will, appear from the judgment of their Lordships.

Upon the question which is the subject of this report, the Appeal Side (Archambeault C.J., Cross, Carroll, Pelletier JJ., Lavergne J. dissenting) affirmed the decision of Monet J. The appeal is reported at Q.R.27 K.B.461.

1919. July 1, 3. *Bisaillon K.C.* and *G. Lawrence* for the appellants.

**Present* : LORD BIRKENHEAD L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD PARMOOR, and MR. JUSTICE DUFF.

† Publication postponed : see note (6) on p. 1016.

Surveyer K.C. and *Hon. M. Macnaghten K.C.* for the respondent Mrs. Roy.

J. C.

1919

AUGER

v.

BEAUDRY.

In addition to cases referred to in the judgment of their Lordships, reference was made to *In re Corbett's Trusts*. (1)

Aug. 5. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The resolution of this dispute depends upon the true construction to be placed on the will of Jean Louis Beaudry, who died on June 25, 1886. He left surviving five children, born in lawful wedlock, four daughters—namely, Corinne Herminie, who married, and is known as Mrs. R. Roy; Léocadie Clorinthe (alias Clorinde) Beaudry, who married Mr. Joseph Cyrille Auger; Victorine Beaudry, who married Mr. Lionel Gardiner; Malvina Beaudry, who married Mr. Edmond Starnes; and one son—Guillaume Napoléon Léonidas Beaudry. Guillaume Napoléon died without issue in 1887. Mrs. Auger died in 1894, leaving ten children, and Mrs. Gardiner died in 1915 without issue.

The question that arises in this case is as to the disposition of the share which Mrs. Gardiner took, both original and accrued, in the testator's property.

The will in question was dated December 29, 1881. It was divided into eighteen articles or paragraphs. By articles 4, 5, 6 and 7, the testator made certain specific gifts in favour of all his five children, other than Mrs. Starnes, whose interest in the estate was by article 8 defined and limited by the grant of an annuity, and whose name need not be considered further in connection with these proceedings. The other gifts were of specific properties, given in favour of his children and grandchildren. In each case the property was bequeathed in the same terms, and taking the case of article 4, which contained the gift to Mrs. Roy, they were as follows: "Je donne et lègue à Dame Corinne Herminie Beaudry épouse de Rouer Roy, la jouissance et usufruit, sa vie durant"—and then follows a full description of the property and the clause concludes by providing that the legatee is to enjoy the property "à titre de constitut et précaire, sa vie durant, et pour, après son décès,

J. C.
1919
AUGER
v.
BEAUDRY.

appartenir la pleine propriété de ces terrains et dépendances aux enfants nés et à naître d'elle en légitime mariage par souches."

Article 18 of the will was divided into clauses ; by clause 9 the testator conferred a power of appointment on each child in favour of their issue, and by clause 6 he provided what should happen in the event of the death of any of these four children without leaving children or living descendants. Upon this clause the whole dispute really depends ; it is in the following words : " Qu'au cas de décès d'aucun des dits Corinne Herminie Beaudry, Guillaume Napoléon Léonidas Beaudry, Léocadie Clorinthe (alias Clorinde) Beaudry, et Victorine Beaudry sans laisser d'enfants ou descendants vivants, sa part dans mes biens retourne aux survivants de mes quatre enfants légitimes ci-dessus en dernier lieu nommés pour, par eux en jouir, à titre de constitut et précaire ou en jouissance, leur vie durant, et pour la propriété d'icelle part appartenir à leurs enfants nés et à naître en légitime mariage et par souches."

In its general form the question that arises is whether this gift over, upon the death of any one of the named children without issue, is a gift which includes in its provisions the children of a child who at the date of such death were surviving, although their parent was dead. Associated with this there were two subsidiary points, the one which drew a distinction between that part of Mrs. Gardiner's estate which was due to her having shared with her sisters in the property left to her brother, and the other as to what was the true nature of Mrs. Roy's interest in the accrued share, and whether in the event of her dying without issue she would have power to dispose of it by will.

The case was originally heard before Monet J., who declared that Mrs. Roy was " unique propriétaire " of the whole of the share she took by reason of Mrs. Gardiner's death without issue, and that this included a share both in Mrs. Gardiner's original estate and in the share she took on her brother's death. On appeal this judgment was modified. Mrs. Roy was, as to Mrs. Gardiner's original share, declared entitled as " Unique propriétaire à titre de constitut et précaire ou en

jouissance sa vie durant à charge de substitution en faveur de ses enfants en vertu de la clause 6 de l'article 18 du dit testament ;" and as to the property which Mrs. Gardiner had taken from Guillaume Napoléon it was declared to form part of Mrs. Gardiner's estate.

J. C.
1919
AUGER
v.
BEAUDRY.

From this judgment the appellants, the children of Mrs. Auger, have brought the present appeal. So far as it relates to the share taken by Mrs. Gardiner in the property given to Guillaume Napoléon, it is impossible as this appeal is constituted to determine the matter, for the legal personal representatives of Mrs. Gardiner have not been made parties. Upon this, therefore, their Lordships will pronounce no opinion, but to avoid the expense of further proceedings and to safeguard the appellant's rights of appeal they will advise that this part of the appeal stand over in order that the appellants may have time to determine whether they think it desirable to add the necessary parties ; if they so desire, and take the necessary steps within six months, their Lordships will then further consider that point which for the present will remain undecided. (1) For the rest, the real question is as to the meaning of the substituted gift. There is no doubt much force in the appellants' contention that no reason whatever can be assigned for excluding from the benefit of the gift the children of a deceased child of the testator. The truth is that in the preparation of such gifts the draftsman is liable to fix his mind simply upon the death of the first of the children to die, in which case the gift over works without difficulty, and he does not concentrate his attention upon what will happen in the event of the death of a child without issue, who has been predeceased by another child leaving issue behind. The gift over, therefore, only too often does not carry out what, if speculation were permitted, it would be reasonably certain that the testator wished, and it is these considerations that have sometimes led the Courts to attempt so to read the words as to make the will conform to what it is confidently believed must have been the testator's intention. If the words are so ambiguous as to leave room for such construction, or if

(1) See note (6), p. 1016.

J. C.
1919
AUGER
v.
BEAUDRY.

there are other words to help the meaning, it is one which no doubt the Courts would readily adopt. But whatever wavering from the strict rule of construction may have taken place in the past, it is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean.

Turning then to the words, we find that the clause provides for the death of any of the four children, each named in turn, without leaving children or living descendants, and in that case the share in the goods is given to the survivors of "*de mes quatre enfants légitimes ci-dessus en dernier lieu nommés,*" to "enjoy the usufruct during their lives," and for the property of that part to belong to their children born, and to be born by stocks. Now, the survivors of the four named children can only be the survivors of the testator's own children, and it is only the property of that part which such survivors enjoy that is to belong to their children after their death. If, therefore, one of the children had died leaving issue before a case occurred which brought the clause into operation, such child would not be one of the survivors to enjoy during life, and there would be no part of the property which could belong to his or her children after death.

This is in their Lordships' view the plain and unmistakable meaning of the words, and it only remains to be considered whether there is an artificial rule of construction provided either by the Civil Code of Lower Canada or by similar cases in the English Courts which would justify another view of their effect.

So far as the Civil Code is concerned the argument depends on art. 980, which is as follows:—"Dans la prohibition d'aliéner, comme dans la substitution, et dans les donations et les legs en général, le terme enfants ou petits enfants, employé seul soit dans la disposition soit dans la condition, s'applique à tous les descendants avec ou sans gradualité

suivant la nature de l'acte." But in the present case there is a strong qualification of the word "enfants"—namely, the words which relate it in terms to the named children, and remembering how carefully the children and the grandchildren are separately dealt with, it is in their Lordships' opinion impossible to say that the word is intended to mean the families of the children when the gift that follows is a gift for life, wholly inapplicable if the word included descendants.

Certain English cases are then quoted for the purpose of supporting the view that under similar words in an English will, the Courts would hold that a survivorship might take place by the survivorship of the family, or as it is sometimes called, by stirpital survivorship. The case most nearly applicable is the case of *Hawkins v. Hamerton*. (1) In that case the testator gave the residue of his estate in trust for his son and three daughters or such of them as should be living at the death of his wife equally during their lives and after their death equally amongst all their children, and he provided that in case any of his said sons and daughters should die without leaving issue the share of him, her, or them so dying should be divided amongst the survivor or survivors of his said children, and their issue in the like equal parts, shares, and proportions. The learned judge said that it appeared plain that the testator by the words "survivor or survivors of my said children" did not mean such of his children as should survive his widow; and he added "my opinion is that though he has used the words 'survivor or survivors,' he meant 'other or others,' and as he has added the words 'in the like equal parts, shares, and proportions,' I think that he meant the issue of deceased parents, to take per stirpes."

It is important to observe the concluding words of this statement, for in truth it is upon them that the decision rested, and it was because the testator had added the final phrase that the learned judge was able to place the construction he did upon the earlier words. It is unnecessary

(1) (1848) 16 Sim. 410, 422.

J. C.
1919
AUGER
v.
BEAUDRY.

J. C.
1919
AUGER
v.
BEAUDRY.

to pursue the English authorities further upon this case, though reference may profitably be made both to the statements of Lord Macnaghten in *King v. Frost* (1) and to those of Cozens-Hardy J. in *Harrison v. Harrison*. (2) The words which have enabled the Courts to give a benevolent construction to a gift over such as those used in *Hawkins v. Hamerton* (3) or in the case of *Waite v. Littlewood* (4), are not to be found in the present case. The gift here is a distinct gift to the survivors, and it is the share that is taken by such survivor that after his or her death is to go to his or her children. A child who does not survive can take no share, and there is consequently nothing that his or her children can take when he or she is dead. Their Lordships note with satisfaction that this opinion is not only in agreement with the judgment from which this appeal is brought, but also with the decision in a case of some resemblance to the present—*Ste. Marie v. Bourassa*. (5) As to whether such share is taken so that on the failure of all Mrs. Roy's descendants at her death she can dispose of it, is a question which does not now and never may arise. Their Lordships do not think that the appellate Court decided that it should be now determined nor do they regard their judgment as having that effect. In their opinion it is only necessary to say that Mrs. Roy is entitled as life usufructuary to the original share which was enjoyed by Mrs. Gardiner, with substitution in favour of her children in accordance with clause 6 of art. 18, and this is the actual judgment of the Court of King's Bench. They reserve the final advice that they are tendering to His Majesty upon this appeal until after the appellants have decided what steps, if any, they propose to take with regard to the question which is left open. (6)

Solicitors for appellants : *Lawrence Jones & Co.*

Solicitors for respondents : *Blake & Redden.*

(1) (1890) 15 App. Cas. 548, 552.

(2) [1901] 2 Ch. 136, 141, 143.

(3) 16 Sim. 410.

(4) (1872) L. R. 8 Ch. 70.

(5) (1913) 18 Revue Légale, 454.

(6) The appeal was in the list for

further hearing in July, 1920, but the parties entered into a compromise of the question left open. Their Lordships finally reported dismissing the appeal upon the agreed terms as to that question.

[PRIVY COUNCIL.]

J. C.*

CITY OF MONTREAL APPELLANTS ;
 AND
 DUFRESNE RESPONDENT.

1920
 June 25.

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC.

*Canada (Quebec)—Expropriation—Compensation paid into Court by Agreement
 —Incidence of Taxation on Money in Court—R. S. Q., 1909, art. 7599.*

The appellant City acquired under the Expropriation Act (R. S. Q., 1909, arts. 7581-7599) land owned by the respondent. The compensation awarded not having been paid within two months from the date of the award as provided by art. 7598 and the City desiring further time to complete the purchase from the respondent and other expropriated owners, it was agreed that the City was to deposit the sum awarded in the hands of the prothonotary of the Superior Court, this payment to have the same effect as if it had been made within the two months. Upon payment out to the respondent there was deducted from the sum awarded to him the amount of two taxes imposed by the law of Quebec upon money paid into Court:—

Held, that the respondent was entitled to be paid by the appellants the amount of taxes so deducted.

Judgment of the Superior Court affirmed.

APPEAL by special leave from a judgment (December 1, 1917) of the Superior Court sitting in review for the District of Montreal, reversing the judgment of Monet J.

The respondent sued the appellants in the Superior Court to recover 403.37 dollars, the amount deducted for taxes upon money in Court, being compensation awarded to the respondent under the Expropriation Act and deposited in the hands of the prothonotary of the Superior Court under the circumstances stated in the judgment of their Lordships.

The trial judge, Monet J., dismissed the action, holding that the deposit in Court was equivalent to payment to the respondent. On proceedings in review the Court (Archibald, Bruneau and Lane JJ.) reversed the decision of the trial judge. The appeal is reported at Q.R.53 S.C.337.

* *Present*: VISCOUNT HALDANE, LORD MOULTON, LORD SUMNER, and LORD PARMOOR.

J. C. 1920. April 26, 27. *Hon. Sir M. Macnaghten K.C.* for
1920 the appellants.
MONTREAL *Owen Thompson K.C.* and *H. Douglas* for the respondent.
(City of)
v.
DUFRESNE.

June 25. The judgment of their Lordships was delivered by

LORD SUMNER. In 1912 and 1913 the City of Montreal had in view a municipal improvement, consisting in the extension of the Rue du Palais, or Boulevard St. Joseph, in the Quartier St. Denis of the City, for which it was necessary to acquire a considerable amount of land then in private hands. The City had special powers of acquiring land by compulsory purchase under a statute which constitutes and is called its charter—namely, 62 Vict. c. 58. Sects. 421–444 of that statute deal expressly with such a point as is now raised, but, either because the Act was inapplicable to the new improvement or for some other reason, a further Act (2 Geo. 5, c. 56) was passed, called “An Act to amend the Charter of the City of Montreal ;” s. 33 of that Act provided that, failing acquisition by private agreement, the City might acquire the necessary lands under the provisions of arts. 7581 to 7599 inclusive of the revised statutes, 1909 (the Expropriation Act).

Negotiations with the separate proprietors, of whom there were between 160 and 170, came to nothing, and in June, 1913, the City proceeded to exercise these new powers of expropriation and gave the necessary notices. The respondent, M. Elphège Dufresne, owned three plots. He refused 5987 dollars, the price offered, and compensation amounting to 19,940 dollars was awarded to him by duly appointed arbitrators.

Art. 7598 contemplates payment of the compensation awarded within two months of the date of an award. The properties were, however, numerous, the titles in some cases involved a considerable amount of investigation, the aggregate compensation ultimately awarded was a large sum, 2,273,638 dollars ; and the City, no doubt wishing to deal with all the proprietors together, allowed the statutory period to elapse without making payments to them. There does not appear to have been any dispute at this stage, and the City even resolved to make some special

arrangements for the convenience of the poorer proprietors. In the meantime, under date April 24, 1914, an agreement with the City was signed by the whole body of expropriated proprietors, granting an extension of time for payment, and, pursuant to this agreement, the City made an aggregate payment into Court on May 9, 1914.

J. C.
1920
MONTREAL
(City of)
v.
DUFRESNE.

The terms of the agreement were (inter alia) as follows: "Nous soussignés, propriétaires expropriés en cette affaire, consentons que le délai fixé par la loi (art. 7581 et suivants des statuts refondus de la Province de Québec 1909), pour permettre à la Cité de payer les montants accordés par les sentences arbitrales rendues en cette affaire, soit prolongé jusqu'au 1^{er} juin prochain. Le délai de deux mois fixé par l'article 7598 des statuts refondus de Québec, 1909, sera censé n'expirer que le 1^{er} juin prochain. La Cité devra déposer les dits montants entre les mains du protonotaire de la Cour Supérieure du District de Montréal, suivant les dispositions des articles 5781 et 7600 des Statuts Refondus de Québec, 1909, et ce paiement aura le même effet que s'il eût été fait dans les deux mois de la date de la reddition des sentences arbitrales."

When money is paid into Court, or, which is the same thing, is deposited in the hands of the prothonotary of the Superior Court of the District of Montreal, it becomes subject to two charges, each of 1 per cent.—namely, a tax imposed by 12 Vict. c. 112, entitled "Acte pour pourvoir à la construction et réparation de maisons de justice et de prisons dans certains endroits de Bas-Canada" and a further charge for the expenses of the protonotaire, imposed by an Order of the Lieutenant-Governor of the Province of Quebec in Council under the provisions of arts. 3550 and 3555 of the Revised Statutes of Quebec, 1909. This latter charge has been imposed under earlier authority as far back as 1861. No question has been raised before their Lordships as to the validity and applicability of these provisions in the present case.

The above-mentioned agreement made no provision at all with regard to these two charges, each of 1 per cent. It is hardly possible that their existence should have been overlooked

J. C. by the parties to the agreement, and indeed, the resolution of
1920 the City of Montreal above referred to, which is only six weeks
MONTREAL later in date than the agreement, makes special mention of
(City of) them, though not so as to affect the present respondent.
v.
DUFRESNE. The questions in this appeal, which relate entirely to these
charges, must, therefore, be decided by considering the nature
of the charges themselves and the provisions of the articles
relating to expropriation, which the City of Montreal put in
force.

The sum paid to the protonotaire on May 9, 1914, was the aggregate compensation awarded—namely, 2,273,638 dollars with legal interest accrued to date, 56,834 dollars. On July 7, the Court, on the motion of the City of Montreal, made an order for payment out of Court in favour of the present respondent. M. Dufresne's title was clear and simple : a certificate of search by the registrar of the Division of Jacques-Cartier and Hochelaga, in which the properties lay, showed three charges on them, amounting to 251.88 dollars, 1560 dollars and 728.28 dollars. The City paid a few dollars or Court costs and the respondent consented to an order. An order was made that the 20,168.38 dollars deposited in Court in respect of the respondent's land should be distributed by paying 403.37 dollars to the protonotaire " pour honoraires et taxes sur deniers de déposé," by paying each of the three charges above mentioned, and by paying the balance—namely, 17,224.85 dollars—to the respondent. The sum of 403.37 dollars is the amount of the two imposts of 1 per cent. above mentioned, and the effect of the order is that the sum, which reached M. Dufresne's hands, or was paid to his use, fell short of the compensation awarded him, and interest due thereon by 403.37 dollars. It is to recover this sum from the City of Montreal that the present action was brought, and the proceedings taken were in the proper form in which to obtain a decision as to the incidence of the charges under the circumstances of the case. The action is a test action.

The provisions under which these sums are imposed are for present purposes neutral. The words of the Act of 1849

are : “ Qu’il soit statué qu’il sera prélevé et payé a Sa Majesté une taxe ou droit de 1 per cent. sur tous les deniers qui, après la passation de cette acte, seront consignés dans toute Cour civile.” No provision is made by which one party can transfer the burden of the tax to another or recover it over against others. No person is ordered to pay. The Crown taxes the deposit, takes its impost where it finds it, and leaves any rights and obligations arising out of this subtraction to be decided by the application of such law or contract as may be material.

The provisions of the Expropriation Act are to the following effect. Where an award of compensation is made, and the expropriating party has paid the amount of it into Court, he becomes at once entitled, by force of the award itself, to take immediate possession, and to exercise the rights in respect of which the compensation was awarded (art. 7595). On the other hand, an expropriatee who is not paid the full amount awarded in capital, interest and costs within two months after the award, may recover the property and possession of his land or rights by ordinary civil action against the expropriator (art. 7599). These articles deal, therefore, with rights and remedies, when no difficulty supervenes upon the making of the award. There is, however, another case—namely, the existence or the fear of the existence of hypothecary claims—and in such a case the expropriator, who is willing to pay, ought not to be harassed, delayed or defeated by the lapse of the time required to ascertain who is entitled to the money, a time which might easily exceed two months. In such a case, which is a case quite distinct from that contemplated in art. 7595, art. 7599 gives him an alternative, which at the same time prevents an action being taken against him under art. 7598 for recovery of the property by the expropriator and enables him to deposit the amount of the award forthwith and free himself from the risk of paying the wrong person. Its material provisions are as follows : “ Ratification of Title. 7599. 1. If the party taking the expropriation proceedings has reason to fear any hypothecary claims, or has other reasons, he may deposit the amount of

J. C.

1920

MONTREAL
(City of)
v.
DUFRESNE.

J. C.
1920
MONTREAL
(City of)
v.
DUFRESNE.

the compensation with the prothonotary of the district in which the lands to be expropriated are situated, with six months' interest, together with a copy of the award. 2. The award shall thereafter be considered a title to the lands therein mentioned, and proceedings shall be had to obtain confirmation of the title in the same manner as for other confirmations of title. 3. The judgment in confirmation of title shall forever bar all claims against the lands, including dower not yet open, as well as any mortgage or incumbrance upon the same. 4. The Court shall grant such order for the distribution, payment or investment of the amount of the compensation, and for securing the rights of the parties interested, which it deems expedient, according to law and equity. 5. The costs of the proceedings shall be paid by the party designated by the Court. 6. If the judgment in ratification of title is obtained in less than six months after the deposit of the amount of the compensation with the prothonotary, the Court shall order that a proportionate part of the interest be refunded to the party who made the deposit. If the judgment is not rendered until after the six months, the Court shall order that such additional sum as it may think right be deposited to meet the amount of the interest."

The exercise by the expropriator of the right to pay money into Court under the provisions of this article is optional. It is given him for his benefit to relieve him from a specified difficulty, or from difficulties of a similar character, and he can resort to it or not as he pleases. It follows that its language must be carefully scrutinized, when he claims that it applies to a new case. Now the present case certainly is. There is no reason to suppose that it was from fear of hypothecary claims that resort was had to payment into Court, and indeed in M. Dufresne's case the charges on the property seem to have been simple claims, which were at once ascertained by reference to the register. No "other reasons" of a similar character are alleged. In fact, it is the appellants' case that the money was paid into Court under the agreement for an extension of time above referred to, and this agreement is not even alleged to have been necessitated by the existence or the fear

of hypothecary claims. The agreement itself is not a "reason" within the meaning of the article.

The appellants have laid considerable stress on the terms of this agreement, and have contended that by reason of the words "la Cité devra déposer les dits montants entre les mains du protonotaire de la Cour Supérieure du District de Montréal," payment into Court was made obligatory on the City, and accordingly the mere fact of such payment operated as a complete discharge of all the obligations created by the award. The trial judge accepted and the Superior Court, sitting in review, rejected this contention. In so far as it turns on the words "devra déposer les dits montants," the question is one merely of translation and of construction, on which their Lordships need say no more than that they do not differ from the view taken in the judgment appealed against. Further, the words of the agreement do not make any mention of art. 7599, and would be satisfied by giving them the effect of preventing the expropriated owners from resorting to their remedies under art. 7598 on an allegation that the specified period of two months had elapsed without payment being made. Their Lordships will, however, examine the question, as it was examined in the Courts below, upon the assumption that the provisions of the article are available to the appellants.

The effect of the contention is that a debtor without having sought out his creditors, and without having paid the amount of his indebtedness into their hands or those of their authorized agents, can obtain a complete discharge from his obligation by payment to a third person, even although the result of the course so taken must be that payment in full will never be made to those creditors or to their use at all. There are no express words in the article which have that effect, and, the whole proceeding expressed in the article being taken to relieve the expropriator from an embarrassment, it is difficult to find any justification for giving him by implication a greater benefit than is afforded by that relief itself. If hypothecary claims are feared, the express operation of the article enables him to protect himself from having to pay twice over, that

J. C.

1920

MONTREAL
(City of)v.
DUFRESNE.

J. C. is, from having to pay the awarded compensation and some-
1920 thing more : why is it to be assumed that it has further an
MONTREAL implied operation, which will secure him a discharge from his
(City of) obligation under the award by paying something less than
v. the awarded sum ?
DUFRESNE.

In effect, the express provisions of the article negative any such implication. The expropriator's right is to deposit with the prothonotary not to pay the amount to him. It is within the power of the Court to order the expropriator to pay the costs of the proceeding, which is inconsistent with the mere payment into Court being his discharge, nor can the sum in dispute in the present case be regarded as costs of the proceeding, which it would be within the power of the Court to award. The expropriator has to deposit six months' interest in Court, six months being apparently the time expected to be occupied in the proceedings preliminary to judgment in ratification of title. The pronouncement of this judgment for ever bars all claims against the lands. After all, the length of time necessary for investigating the rights of parties claiming in a hypothecary interest cannot depend on the expropriator, who did not create them. Their complexities arose between and concern the expropriatees and the claimants, yet, if this investigation takes less than six months, the expropriator gets some interest back, and, if it takes more, the Court " shall " order him to make a further deposit to meet the amount of the interest. These provisions are quite inconsistent with the view that payment into Court is in itself an acquittance and discharge to the expropriator.

Their Lordships are accordingly of opinion that, at the time when the tax now in question was levied on the fund in Court, the expropriators, now appellants, had not discharged their obligation to pay the sum named in the award, and that, as the sum remaining in Court available to be paid out in satisfaction of the compensation awarded fell short of the total amount of that compensation, it is still incumbent on the appellants to pay to the respondent the residue. The judgment appealed against was therefore right, and their Lordships

will humbly advise His Majesty that this appeal should be dismissed with costs. In accordance with the terms by which the appellants undertook to abide as a condition of special leave to appeal being granted, these costs will be taxed as between solicitor and client.

J. C.
1920
MONTREAL
(City of)
v.
DUFRESNE.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondent: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

WEST INDIA ELECTRIC COMPANY, }
LIMITED } APPELLANTS ;

J. C.*
1920
July 16.

AND

ROBERTS RESPONDENT.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF JAMAICA, COURT
OF APPEAL.

*Appeal—New Trial—Excessive Damages—Verdict of Jury—Weight of
Majority Verdict.*

Where the law permits the verdict of the majority of a jury to be accepted, a majority verdict should be regarded by the appellate Court as equal in weight and value to a verdict that is unanimous.

Judgment of Court of Appeal affirmed.

APPEAL and cross-appeal from a judgment of the Supreme Court of Jamaica, Appeal Court (March 6, 1919), ordering a new trial in an action for damages.

The facts appear from the judgment of their Lordships.

1920. June 28, 29. *Barrington-Ward K.C.* and *Archibald* for the appellant company.

* *Present* : LORD BUCKMASTER, LORD ATKINSON, and MR. JUSTICE DUFF.

A. C. 1920.

3 Z

3

J. C. *Douglas Hogg K.C.* and *Fortune* for the respondent
1920 and cross-appellant.

WEST Reference was made to *Phillips v. London and South*
INDIA *Western Ry. Co.* (1) and *Johnston v. Great Western Ry. Co.* (2)
ELECTRIC
COMPANY

v.
ROBERTS

July 16. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The appellants in the principal appeal are the West India Electric Company, Limited, who own and operate a series of tramways in Kingston, Jamaica.

On September 12, 1917, between the hours of 7.30 and 8 in the evening, the respondent was injured, owing to one of the appellants' tramcars overtaking and colliding with the vehicle in which he was riding. He sued the appellants for damages for the serious injuries that he sustained, and on November 23, 1918, he obtained a verdict in his favour for the sum of 6279 $\frac{1}{2}$ l. Against that verdict the appellants brought an appeal to the Appeal Court of the Supreme Court of Judicature of Jamaica, alleging, first, that the verdict of the jury was against the weight of the evidence, and secondly, that the damages were excessive. The first of these grounds was rejected by the Court of Appeal, but the second was approved, and an order was made that there should be a new trial on the question of damages alone. From the first part of this judgment the present appeal is brought, and from the latter the cross-appeal by the respondent, who seeks to restore the verdict of the jury.

In their Lordships' opinion, both appeals must fail. With regard to the first, it is unnecessary to do more than to recount a few of the simple circumstances of the accident, as shown by evidence which in fact was uncontradicted. The night was dark and the plaintiff was being driven in a one-horse four-wheeled vehicle. He was on his right side of the road near the tram lines, and at the time of the accident the vehicle was passing a horse on its off side. The driver of the car rang his bell, but this the driver of the vehicle said he did not hear. The car passed by the hind wheel of the vehicle, but struck the fore wheel and

(1) (1879) 5 Q. B. D. 78.

(2) [1904] 2 K. B. 250.

thereby caused the accident. These facts unless answered are sufficient to establish a reasonable ground for holding that the driver of the tramcar was negligent. He was either proceeding at a pace too fast to enable him to pull up in time, or he thought that the vehicle in front and dangerously near would keep clear of his way and that he was, therefore, entitled to continue his course. But the driver of a tramcar whose course is fixed when overtaking another vehicle on the high road must not proceed upon the hypothesis that when once he has rung his bell and given warning, a vehicle close to his near side which he is about to pass will keep itself clear of his path. The driver of the tramcar, however, alleges that the driver of the vehicle swerved suddenly in front of him, and that it was this which was the cause of the accident. If this were true it might afford an answer, but the probability of truth as between the two stories is eminently a question for the jury's consideration. No complaint is made as to the summing up of the learned judge, and, in their Lordships' opinion, it is impossible to contend successfully that the jury's verdict was perverse and unreasonable in reaching the conclusion that they did, attributing negligence to the driver of the car.

So far as the cross-appeal is concerned, it is more difficult to determine. The respondent has undoubtedly suffered serious and permanent injury and for some time endured considerable physical suffering. He has lost a substantial and valuable post by reason of the accident and there was uncontradicted evidence to show that he will be seriously impeded in the future conduct of his profession. It is not possible in cases such as this to lay down any fixed standard by which to measure the damages sustained. In a certain sense they are incalculable, for no pecuniary recompense can be regarded as equivalent to loss of health or the free use of limbs and faculties. Nor again can any exact rule determine the prospective loss that a man may be caused in the pursuit of his profession. Such a calculation may vary from time to time and from place to place. Where occupation is difficult to obtain, the damages may be higher

J. C.
1920
WEST
INDIA
ELECTRIC
COMPANY
v.
ROBERTS.

J. C.
1920
WEST
INDIA
ELECTRIC
COMPANY
v.
ROBERTS.

than where there is a great demand for such services as the injured man can offer. Local conditions affect and qualify the amount that the Courts would regard as reasonable as recompense for loss in business or in profession. The Court of Appeal in this case, with the knowledge of these conditions that this Board cannot possess, regard the amount awarded as so excessive that the appellants are entitled to have the matter reconsidered, and their Lordships can find no firm ground on which to disagree with such a judgment.

They have only to add that without further explanation the statement contained in the judgment of the Appeal Court, that the verdict as to damages was a verdict of the majority, is not a consideration that ought to have weighed with the Court. It may be that the minority were in favour of even a larger sum, but whether this be so or not, the verdict of the majority must, by the law which permits it being accepted in the place of unanimity, be regarded as equal in weight and value to one that is unanimous. The Court of Appeal appear to have formed their judgment independently of this consideration, and it cannot, therefore, be said that this argument, which their Lordships regard as unsound, was the basis upon which the judgment appealed from stands. Their Lordships will therefore humbly advise His Majesty that both these appeals should be dismissed and that no costs should be awarded to either side.

Solicitors for appellant company: *Charles Russell & Co.*

Solicitors for respondent and cross-appellant: *Morley, Shirreff & Co.*

[PRIVY COUNCIL.]

J. C.*

PAQUET AND ANOTHER APPELLANTS ;

1920

July 22.

AND

CORPORATION OF PILOTS FOR (AND)
 BELOW THE HARBOUR OF } RESPONDENTS.
 QUEBEC }

ATTORNEY-GENERAL FOR CANADA . INTERVENER.

ON APPEAL FROM THE COURT OF KING'S BENCH
 FOR THE PROVINCE OF QUEBEC.

*Canada (Quebec)—Pilotage Dues—Quebec Harbour—Right to collect Dues—
 Corporation of Pilots—Legislative Authority—British North America Act,
 1867 (30 & 31 Vict. c. 3, Imp.), ss. 91, 92—23 Vict. c. 123 (Can.)—
 4 & 5 Geo. 5, c. 48 (Dom.), ss. 1, 2.*

The power of the Corporation of Pilots for and below the Harbour of Quebec under 23 Vict. c. 123 (Can.) to demand pilotage dues, and to call on pilots to hand over their earnings as received, is extinguished by 4 & 5 Geo. 5, c. 123 (Dom.). So held without deciding whether the Corporation can still demand from a pilot a contribution to the pilots' pension fund. The Dominion Legislature has power under the British North America Act, 1867, s. 91, head 10 (navigation and shipping), to enact laws which relate to pilotage, although they trench upon property and civil rights in a province.

Judgment of the Court of King's Bench reversed.

APPEAL by special leave from a judgment of the Court of King's Bench for Quebec (April 3, 1918) reversing a judgment of the Superior Court (November 2, 1917).

The respondent Corporation sued the first appellant, since deceased, in the Superior Court, to recover the amount earned by him for pilotage services during the season of navigation of 1917. The defendant pleaded that under the Dominion statute 4 & 5 Geo. 5, c. 48, he was entitled to retain for his own use and benefit the amount of his earnings over and above such sum as might be required for the pilots' pension fund. The

* *Present*: VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, LORD ATKINSON, and MR. JUSTICE DUFF.

J. C. relevant statutory provisions appear from the judgment of their Lordships.

1920
PAQUET
v.
PILOTS'
CORPOR-
ATION
(Quebec).

The trial judge (Dorion J.) dismissed the action. On appeal the Court of King's Bench (Archambeault C.J. and Lavergne, Carroll, and Pelletier JJ.; Cross J. dissenting) reversed the decision and gave judgment for the present respondents.

By the Order in Council granting special leave to appeal the Attorney-General for Canada was given leave to intervene to support the appeal.

1920. July 15, 16. *Newcombe K.C.*, *Meredith K.C.*, and *T. Mathew* for the appellants and intervener.

Macmaster K.C. and *Hon. S. O. Henn Collins* for the respondents.

The arguments were directed to the meaning and effect of 4 & 5 Geo. 5, c. 48 (Dom.), and by-law No. 37 of the by-laws made under that Act and s. 443 of the Canada Shipping Act. The validity of the Dominion Acts above mentioned was not disputed.

July 22. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case the Attorney-General for the Dominion of Canada has been made a co-appellant, as the appeal raises questions in which the Dominion Government has a direct interest.

In 1917 the respondent Corporation brought the action out of which the appeal arises, in the Superior Court of the Province of Quebec, against a pilot named Paquet, who was one of the members of the Corporation, to recover a sum of about 532 dollars, being the amount earned by him for services as a pilot of the Harbour of Quebec. In the Court of first instance Dorion J. decided for the defendant, but on appeal to the Court of King's Bench for the Province this decision was reversed by a majority of the learned judges of that Court, Cross J. dissenting. Paquet died subsequently, and his personal representative is the first appellant.

The plaintiff Corporation consists of the licensed pilots of the Harbour of Quebec and below. In 1860 they had been incor-

porated by a statute of the then Province of Canada. Under that statute the pilots had to hand over their earnings to the Corporation, and out of the fund so constituted the former were paid by the latter, who were to distribute the surplus among the pilots.

After the quasi-federal distribution of legislative powers which was effected by the British North America Act in 1867, it is clear that the power to pass laws regulating the pilotage system of the harbour was given exclusively to the Dominion Parliament. Navigation and shipping form the tenth class of the subjects enumerated as exclusively belonging to the Dominion in s. 91 of the Act, and the second class in the section, the regulation of trade and commerce, is concerned with some aspects at least of the same subject. Whether the words "trade and commerce," if these alone had been enumerated subjects, would have been sufficient to exclude the Provincial Legislature from dealing with pilotage, it is not necessary to consider, because, in their Lordships' opinion, the introduction into s. 91 of the words "navigation and shipping" puts the matter beyond question. It is, of course, true that the class of subjects designated as "property and civil rights" in s. 92 and there given exclusively to the Province would be trenched on if that section were to be interpreted by itself. But the language of s. 92 has to be read along with that of s. 91, and the generality of the wording of s. 92 has to be interpreted as restricted by the specific language of s. 91, in accordance with the well-established principle that subjects which in one aspect may come under s. 92 may in another aspect that is made dominant be brought within s. 91. That this principle applies in the case before their Lordships they entertain no doubt, and it was, therefore, in their opinion, for the Dominion and not for the Provincial Legislature to deal exclusively with the subject of pilotage after confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected.

The Dominion Parliament, after confederation, passed the

J. C.
1920
PAQUET
v.
PILOTS'
CORPOR-
ATION
(Quebec).

J. C. 1920
PAQUET
v.
PILOTS'
CORPOR-
ATION
(Quebec).

Canada Shipping Act, now c. 113 of the Revised Statutes of Canada, 1906. Part 6 of that Act dealt with pilotage. By s. 411 the pilotage district of Quebec is defined, and by s. 413 the Dominion Minister of Marine and Fisheries is to be the pilotage authority, in whom all the powers of the Harbour Commissioners of Quebec are vested. By subsequent sections the Minister was given powers to regulate the qualifications of pilots, the management and maintenance of their boats and the distribution of their earnings, the performance of their duties, and, subject to the limitation referred to in the case of the Quebec District, the mode and amount of remunerating the pilots, and the establishment of superannuation funds; but the alteration of the rates for pilotage in the Quebec District and of the administration or distribution of their earnings was excluded from the power of the Minister by s. 434. For some purposes, other than those specifically conferred on the Minister, the respondent Corporation retained powers, and among them were rights in certain cases to demand from the masters of ships pilotage dues. Out of the sums thus received the treasurer of the respondent Corporation was to set aside 7 per cent. for a pilot fund, and the Corporation was to account to the Minister for the administration of this fund, which was due to be employed for superannuation purposes.

It is, however, in their Lordships' view unnecessary to determine precisely what powers remained to the respondent Corporation after the passing of the Canada Shipping Act of 1906, for in 1914 another statute amending it was passed by the Dominion Parliament, and this statute applies in the case before them. It provides by s. 1 that the Minister, subject to the provisions of the general Canada Shipping Act, is to have charge of the control and management of the pilots and their boats for the pilotage district of Quebec, and of all questions respecting pilotage arising in connection with such district, and of the collection of pilotage dues in respect of such district; and that all powers vested in the Corporation of Pilots of Quebec under Part 6 of the Canada Shipping Act are transferred to and vested in the Minister. By s. 2 all powers of the Corporation of Pilots with respect to the manage-

ment and control of pilots and their duties, the collection of pilotage dues and the management and control of pilotage, were thereby repealed. By s. 3 nothing in the Act was to be deemed to affect any power possessed by the Corporation in connection with the management and disposal of the pilot pension fund, but such power was to be exercised under the supervision of the Minister as theretofore.

In their Lordships' opinion it is plain that whatever powers to demand dues, or to call on a pilot to hand over his earnings as received, may have survived to the respondent Corporation after the passing of the general Canada Shipping Act, are now extinguished by the first and second sections of the Act of 1914. What right the Corporation may have had as between itself and the original defendant Paquet to demand from him a contribution to the superannuation fund is not a question which is before their Lordships. It is enough for them to say that they are unable to take the view of the majority of the learned judges in the Court of King's Bench, that there is no repeal of the title of the respondent Corporation to receive the pilotage dues which a pilot may now earn. The result of the Act of 1914 is to get rid altogether of the old title of the Corporation, and to enable the Minister to direct that the payment shall be made to the pilot employed and no one else.

They will therefore humbly advise His Majesty that the judgment of the Court of King's Bench, which was in favour of the Corporation as plaintiffs, should be reversed and that of Dorion J., dismissing the action with costs, should be restored. The appellant Paquet will have his costs here, in so far as he has incurred costs, and in the Court of King's Bench. The Attorney-General for Canada, in accordance with the usual practice, will receive no separate costs.

Solicitors for appellants and intervener: *Charles Russell & Co.*

Solicitors for respondents: *Stephenson, Harwood & Co.*

J. C.
1920
PAQUET
v.
PILOTS'
CORPOR-
ATION
(Quebec).

J. C.

1920

July 29.

[PRIVY COUNCIL.]

THE DÜSSELDORF.

ON APPEAL FROM THE PRIZE COURT, ENGLAND.

*Prize Court—Neutral Territorial Waters—Enemy Ship—Capture—Claim by
Neutral Government—Restitutio in Integrum.*

In proceedings in prize for the condemnation of an enemy ship captured by a British cruiser a claim for her release was made on behalf of the Norwegian Government on the ground that the capture had been effected in Norwegian territorial waters. The Prize Court ordered a release to the claimant upon that ground, but, finding that the violation of territorial waters was unintentional and the result merely of an error of judgment, rejected a claim to damages and costs. The claimant appealed:—

Held, that, on the principle of restitutio in integrum, the claimant should recover such expense of removing the ship to Norwegian, or other neutral waters, as would fall upon the Norwegian Government; but that the costs and fees payable to the Marshal of the Prize Court were not recoverable by the claimant, nor any sum for the use of the ship under requisition by the Admiralty.

Judgment of the Prize Court varied.

APPEAL from that portion of a decree of the President of the Admiralty Division (in Prize) (1), dated May 12, 1919, which as disallowed a claim in respect of costs and damages incurred by reason of the capture and detention of the German steamship *Düsseldorf* and her cargo. The claim and the appeal were on behalf of the Norwegian Government, and were made under the circumstances appearing in the judgment of their Lordships.

1920. June 18, 21. *Sir Erle Richards K.C.* and *Balloch* for the appellant. By international law the Norwegian Government is under a duty to make reparation to the German Government for the violation of Norwegian territorial waters

* *Present*: LORD SUMNER, LORD PARMOOR, and SIR ARTHUR CHANNELL.

and is entitled to be put into the position to do so : *The Twee Gebroeders* (1) ; *The Anna* (2) ; *The Acteon* (3) ; *The John* (4) ; Hague Convention No. 13 ; Oppenheim's International Law, 2nd ed., vol. ii., p. 442, § 362 ; Law and Custom of the Seas (Navy Records Society), pp. 179, 304, 354, 362, 489. The judgment of the Board in *The Ostsee* (5) shows that a captor who improperly seizes a ship is liable for damages even though the seizure is the result of an honest mistake. If the appellant is not entitled to recover for the use of the ship as damages, he is entitled to recover the expense which will be incurred in taking the ship to Norway and the cost and expenses, including the Marshal's fees, necessarily incurred to obtain restitution. [Reference was also made to *The Pellworm* (6) and *The Valeria*. (7)]

Sir Gordon Hewart A.-G., *Aspinall K.C.* and *Raeburn K.C.* for the respondent, the Procurator-General. The President found that the seizure took place only just within the territorial waters, the violation being unintentional. Under those circumstances it was within the discretion of the Prize Court to award or withhold costs and damages : *The Vrow Anna Catharina* (8) ; *The Anna*. (2) Damages are awarded only when there has been a wilful breach amounting to misconduct : *The Twee Gebroeders*. (9) The costs and fees payable to the Marshal are a charge upon the ship and are not recoverable by the owner upon a restitution decree : *The Franciska*. (10) No award of damages for the use of the ship has ever been made even in favour of a neutral owner ; in the present case the claim is on behalf of enemy owners. It may be that the Norwegian Government can reasonably claim from the British Government any expense incurred in returning the ship to her owners, but that is not a claim which can be asserted in the Prize Court.

Balloch replied.

- | | |
|--------------------------------|-------------------------------|
| (1) (1801) 3 C. Rob. 162, 336. | (6) [1920] P. 347. |
| (2) (1805) 5 C. Rob. 373. | (7) [1920] P. 81. |
| (3) (1815) 2 Dod. 48. | (8) (1803) 5 C. Rob. 15. |
| (4) (1818) 2 Dod. 336. | (9) 3 C. Rob. 162. |
| (5) (1855) 9 Moo. P. C. 150. | (10) (1856) 10 Moo. P. C. 73. |

J. C.
1920
THE
DÜSSELDORF.

J. C. July 29. The judgment of their Lordships was delivered by
1920 LORD SUMNER. In this case the *Düsseldorf*, a German ship,
THE was making her way from Narvik, with a cargo of iron ore,
DÜSSELDORF. down the Norwegian coast towards the entrance to the Baltic,
— and so to Emden. Her object was to keep within Norwegian
territorial waters, so as to baffle capture by British men-of-war.
She was taken by H.M.S. *Tay and Tyne*, at a point off
Buholmen and Grisholmen, which was, as it turned out, a
little (say 200 yards) within the territorial limits. The
learned President, Lord Sterndale, found that the commander
of the *Tay and Tyne* had no intention of violating Norwegian
neutrality, but that, by an error of judgment, which their
Lordships consider to have been very pardonable, he conceived
that the three-mile line should be drawn a little further to
the east than its true position. It is plain that the German
shipowners had a narrow and somewhat lucky escape, and
that the sovereignty of Norway suffered the minimum of
prejudice from this unintentional violation.

The present claim was made on behalf of His Majesty the
King of Norway by the appellant, Mr. Waldemar Eckell, the
Royal Norwegian Consul-General in London. His claim was,
first, for delivery up of the *Düsseldorf* and her cargo or its
proceeds; secondly, for the cost of removing her to Norway;
thirdly, for costs and fees payable to the Marshal of the Prize
Court or otherwise upon her delivery; and fourthly, the
vessel having been regularly requisitioned by His Majesty's
Government pending the hearing before the Prize Court, for
an account of profits made by the Crown from the use of
the ship, or alternatively, for payment of a reasonable sum
for her use.

It may be well to consider in the first instance how this
matter stands, apart from authority. In the vessel herself
and her cargo, on their own account, the Norwegian
Government have neither right, title nor interest, nor had
they ever even possession. The German owners have all the
right and interest, and, in the absence of any treaty or
convention dealing with the case, they can neither come
before the Court directly as claimants nor can they be allowed

to do indirectly what is directly incompetent. Indeed, as against them, the capture is good, being the capture of enemy property; and the "claim of territory," as it is called, is one which is available to the territorial sovereign only, and not to the private shipowner. These considerations, apart from the validity and effect of Orders, regularly made, permitting the Admiralty to requisition the vessel, at once dispose of the fourth claim—namely, that for profits or freight, or hire in respect of the benefit which the British Government obtained from requisitioning the vessel under the Prize Rules. If the appellant recovered any such sum, it would be held simply in the interest of the enemy owners. No claim has been made, nor has any evidence been given, on the footing that the Norwegian Government have come under any pecuniary liability to the owners of the *Düsseldorf*, nor is there any suggestion that the seizure involved them in any outlay or pecuniary disadvantage outside of these proceedings. No one would wish to make light of a violation of territorial sovereignty, but in itself this is a matter arising between sovereigns and, apart from the peculiar position of captors who are bound to bring their alleged prize before the Court, it would in itself be non-justiciable, for in effect the Prize Court would be called on to pronounce a decree, founded on the conduct of his officers, against the Sovereign in virtue of whose commission it is authorized to act, and to evaluate imponderable wrongs, which lie outside the category of those with which it is wont to deal.

A Court of Prize is not, as such, a disciplinary tribunal for officers in His Majesty's Navy, charged with the correction of errors committed by them while discharging their duties. Any complaint against such officers, which the Government of Norway might have, and any claim for amends for an invasion of the territorial sovereignty of Norway, would fitly be preferred through diplomatic channels to His Majesty's Government for examination and redress.

The facts that the Court found itself regularly in possession of the *Düsseldorf*, and subsequently made a regular order giving leave to requisition her, are at once the foundation of

J. C.
1920
THE
DÜSSELDORF.

J. C.
1920
THE
DÜSSELDORF.

the jurisdiction and the occasion of the Norwegian Government's appearance. It is a fortunate circumstance that the ancient practice, by which Courts of Prize entertain litigious claims of this kind made on behalf of neutral Powers, led long ago to the submission of one class of international questions, at any rate, to a judicial determination instead of to the arbitrament of arms, and so provided for a solution of vexed questions at once peaceful, honourable and friendly. It may therefore well be that the rules which apply to capture on the high seas are by no means closely applicable to capture in neutral territorial waters. On the high seas, if there is reasonable ground for detention, the risk of it is one which even a neutral must run, and the appropriate remedy is the release of the ship in this country. In neutral waters, on the other hand, no capture should be made at all, and rules applicable to the high seas are not in *pari materia*. Simple release of the ship in this country to the claimant Sovereign may be an inadequate redress. The fact that the Court has duly received into its charge and jurisdiction a ship which ought not to have been seized at all, leads to the conclusion that the true claim of the appellant is for a *restitutio in integrum*, so far as the Government of Norway is concerned; but that, naturally as their Lordships would incline to a treatment of it as liberal and ungrudging as possible, they are still bound to act judicially and to follow legal principles and the decisions already given in prize cases.

The authorities prior in date to the recent war are few in number and are somewhat indeterminate. In cases between captors and private owners the jurisdiction to award damages and costs against the former on the ground of their misconduct, or to refuse to give them in favour of the latter where their conduct had been suspicious or irregular, was long ago well recognized, but the language used in stating the grounds of it was not uniform. Sometimes Sir William Scott spoke of such decrees as giving compensation to the suffering owners, whether the misconduct of the captors was intentional or not; sometimes they were made avowedly as a punishment to deter others, generally privateers, from the repetition of

offences. In *The Ostsee* (1) the Privy Council laid it down that the former is the better view, though, if so, it is not easy to appreciate the relevancy of inquiring whether the captors acted under a reasonable mistake. From such a jurisdiction little guidance is to be obtained in the present case. Of actual "claims of territory" but few are reported. There are three decisions of Sir William Scott—*The Twee Gebroeders* (2), *The Vrow Anna Catharina* (3) and *The Anna* (4)—and during the present war, in addition to the present case, there have been *The Lokken* (July 26, 1918) (5), *The Valeria* (6), and *The Pellworm* (April 21, 1920). (7) No point has been argued in the present case as to the effect of the provisions of the Treaty of Versailles, such as was discussed in *The Pellworm*. (7)

J. C.
1920
THE
DÜSSELDORF.

In *The Vrow Anna Catharina* (8) Sir William Scott observes: "The sanctity of a claim of territory is undoubtedly very high. . . . When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy; and if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to farther punishment."

In *The Twee Gebroeders* (2) the same great authority condemned the conduct of the captors as having been in violation of a neutral Sovereign's rights; but held that, as they had not intended to commit any wrong, and as it was not easy for them to have ascertained where the neutral boundary ran, they ought not to be held liable in damages and costs. On the other hand, in *The Anna* (4), which was the case of a privateer and not of a regular King's ship, there had been deliberate abuse of the territorial waters of the United States, and in a claim of territory restitution of the captured vessel was accompanied with a decree for payment of damages and costs. It does not appear what the measure

(1) 9 Moo. P. C. 150.

(2) 3 C. Rob. 162.

(3) 5 C. Rob. 15.

(4) 5 C. Rob. 373.

(5) Unreported.

(6) [1920] P. 81.

(7) [1920] P. 347.

(8) 5 C. Rob. 15, 16.

J. C. of these damages was, or whether the Government of the
1920 United States had been put to actual expense by the conduct
THE of the privateer.

DÜSSELDORF.

In the present case there can be no doubt that the appellant was entitled to have the *Düsseldorf* (and the proceeds of the cargo) released to him on behalf of His Majesty the King of Norway. Had the naval officer's error been brought to the notice of the British Government forthwith, before the *Düsseldorf* was brought before the Prize Court, her prompt return to Norway on behalf of the Crown, with suitable expressions of regret and regard, would, it can hardly be doubted, have been an ample satisfaction to the King of Norway for the unintentional wrong done. In the event, which has happened, of the ship's being placed in the Prize Court, the question now is what further relief, if any, should be accorded to the claimant.

The learned President, Lord Sterndale, before whom this question was hardly sufficiently argued, decided, on the authority of *The Twee Gebroeders* (1), that there was no ground for decreeing such costs and damages to the claimant as it has been the practice to grant where the violation of neutrality has been high-handed, negligent or designed. If this were the sole ground on which the matter could be put, there can be no doubt that his decision ought to be affirmed.

It is, however, now on fuller argument contended that, as the right of the Norwegian Government is at least for restoration, this involves either the physical redelivery of the *Düsseldorf* in Norwegian waters, which is not really asked for, or the payment of the costs of her return voyage. The ground is that, if this be not so, the Norwegian Government must either pay this expense, and so suffer pecuniarily for the error of a British officer, or leave the German owners to navigate the vessel for themselves. In any case, as between the Norwegian Government and persons whose property at the time of the seizure was within the territorial jurisdiction of the King of Norway and sub protectione regis, this would place his Government in the invidious position of leaving

(1) 3 C. Rob. 162.

them without any redress at all for a seizure which occurred notwithstanding their claim to the protection of the Norwegian Crown. There is a further matter for consideration, which is this. If the hearing had been completed and the release had been decreed, *flagrante bello*, as might have been the case, and if the Norwegian Government, to avoid expense and responsibility for which they would receive no recompense, had forthwith handed the *Düsseldorf* over to her owners before she had reached the security of neutral waters, she might have been captured again. In that case the Government of His Majesty the King of Norway might have been exposed to the observation that their proceedings resulted merely in the vindication of the public sovereignty of the Kingdom of Norway without advantage or redress to the private rights which had suffered interference while within the limits of that realm. Their Lordships think that this argument is well founded, and that, alike from the necessity of performing and paying for the voyage to Norway at their own expense, and from the possibility of being exposed to any such reflection, the Norwegian Government ought to be protected. They are therefore entitled to costs of the voyage to Norway paid and borne by them.

The claim for repayment of the Marshal's fees and other similar sums rests on a different footing. Here the important points are that the ship came regularly into the custody of the officers of the Court and, but for the requisitioning, which also was a regular proceeding, would have remained throughout in its charge, and so would have had the benefit of care and protection, which would enure to enhance the vessel's value or avert depreciation. Even in the hands of the Admiralty, she has necessarily had the benefit of a certain amount of upkeep in the ordinary course of user, and there is no suggestion of ill-usage, neglect or wilful deterioration. Although, as now appears, the captors had no legal right to possession, they were in fact in possession in all good faith, and, in placing the ship and cargo in the custody of the Marshal, they acted in discharge of an obligation of a very binding character, from the observance of which

J. C.
1920
THE
DÜSSELDORF.

J. C.
1920
THE
DÜSSELDORF.

it would be most inexpedient in any way to deter persons in their position. Further, in a matter of costs it is particularly necessary to observe settled rules of practice, for costs are always somewhat artificial matters and dependent on the practice of the Court. It has been laid down in *The Franciska* (1) by their Lordships' Board that such costs as those now in question are properly charges on the property itself, because it is for the benefit of whom it may concern that the ship and cargo should be placed in the care and custody of the Marshal of the Court. This decision is, of course, binding upon their Lordships, and they therefore think that these charges form a proper charge against the ship and fall to be discharged by those to whom she is delivered up, nor is it necessary or appropriate to inquire under what form or by what process, if any, they may be recovered over from the German owners.

It is possible that some part or the whole of the costs of transferring the *Düsseldorf* to neutral waters has been paid, or contracted to be paid, by her owners, and so has not fallen, or, if they perform their contract, will not ultimately fall, on the Government of Norway. In such a case the appellant will not recover them in these proceedings.

In the result the appeal will be allowed with costs, and the decree of the President will be varied by directing that the appellant is entitled to be paid such expenses of removing the *Düsseldorf* from British waters to Norwegian or other neutral waters as may have fallen, or will ultimately fall, on the Government of Norway, but otherwise the decision of the President will be affirmed. The case will be remitted to the Prize Court to make the necessary formal decree and to direct a reference to the Registrar. Their Lordships will humbly advise His Majesty to this effect.

Solicitors for appellant: *Waltons & Co.*

Solicitor for respondent: *Treasury Solicitor.*

(1) 10 Moo. P. C. 73.

END OF VOLUME.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1920, will be as follows:—

In the First Series,
[1920] 1 Ch. [1920] 2 Ch.

In the Second Series,
[1920] 1 K. B. [1920] 2 K. B. [1920] 3 K. B. [1920] P.

In the Third Series,
[1920] A. C.

INDEX.

ACCIDENT—Injury.
See WORKMEN'S COMPENSATION.

ACTION—Bankrupt—Trustee - - - 102
See BANKRUPTCY.

— Cause of—C.i.f. contract—Breach 144
See SERVICE OUT OF THE JURIS-
DICTION.

— Crown - - - - - 358
See CROWN.

— Limitations, Statutes of - - - 636
See LIMITATIONS, STATUTES OF.

ADOPTION—Maori adoption of European
child—New Zealand - - - 198
See NEW ZEALAND.

ADVANCES—Agent - - - - - 899
See PRIZE COURT.

AFFIDAVIT—Documents—Conclusiveness
See DISCOVERY. 581

AGENT—Selling — Consignment to — Ad-
vances by - - - - - 899
See PRIZE COURT.

AGREEMENT—Bank supervising business
of trading customer during absence
abroad - - - - - 102
See BANKRUPTCY.

ANNUAL VALUE—Rating - - - - - 273
See RATES.

APPEAL—Court of Appeal — Practice —
Point of law not raised at trial 254
See RAILWAY.

— House of Lords - - - - - 39, 102
See BANKRUPTCY and WORKMEN'S
COMPENSATION.

— Judicial Committee.
See JUDICIAL COMMITTEE.

A. C. 1920.

ARBITRATOR—Award—Workmen's com-
pensation - - - - - 1
See WORKMEN'S COMPENSATION.

“ **ARMED SHIP** ” - - - - - 403
See PRIZE COURT.

ASSESSMENT—Rating.
See RATES.

AUSTRALIA—Bank - - - - - 683
See BANK.

2. — (NEW SOUTH WALES)—Landlord
and Tenant—Lease of Premises in Sydney—
Rate on Land Value—Deduction from Rent—
Adjustment by Tax Commissioners—Sydney
Corporation (Amendment) Act, 1908 (N.S.W.,
1908, No. 27), s. 11, sub-s. 2.
Judgment of the Supreme Court affirmed.
MICK SIMMONS, LD. v. ROFE - J. C. 379

3. — (QUEENSLAND) — Constitutional
Law—Power of Legislature—Appointment of
Judge of Supreme Court—Term of Office—In-
consistency with Constitution—Judge of Court
of Industrial Arbitration — Construction of
Commission—Order in Council of June 6,
1859—Constitution Act of 1867 (31 Vict.,
No. 38, Queensland), ss. 2, 15—Colonial Laws
Validity Act, 1865 (28 & 29 Vict. c. 63,
Imp.), s. 5—Industrial Arbitration Act of
1916 (7 Geo. 5, No. 16, Queensland), s. 6,
sub-s. 6. MCCAWLEY v. REX, ATT.-GEN. FOR
ENGLAND, INTERV. - - - - - J. C. 691

4. — (QUEENSLAND) — Sugar Culti-
vation — “Employee” — Dictation Test —
Exemption — Onus of Proof — Sugar Culti-
vation Act of 1913 (Queensland), 1913, c. 4),
s. 4.
Judgment of the Supreme Court affirmed.
ADDAR KHAN v. MULLINS - - - - - J. C. 391

AUTHORITY—Consignor - - - - - 324
See CARRIER.

4 B

3

AWARD—Workmen's compensation - 1
See WORKMEN'S COMPENSATION.

BANK—Negligence — Crossed Cheque—Defective Title — Liability of Banker — "Customer" — Bills of Exchange Act, 1909 (No. 27 of 1909, Commonwealth), s. 88, sub-s. 1. **TAXATION COMMRS. v. ENGLISH, SCOTTISH AND AUSTRALIAN BANK, LD.** - J. C. 683

— Negligence - - - - 102
See BANKRUPTCY.

— "Sale" of draft to - - - 724
See PRIZE COURT.

BANKRUPTCY—Agreement by a Bank to supervise Business of trading Customer during Absence abroad—Bankruptcy of Customer owing to Negligence of Bank—Action by Bankrupt and his Trustee for Breach of Agreement—Damages—Injury to Credit and Reputation—Personal Right of Bankrupt to Damages—Absence of special Damage—New Trial—Point of Law not taken at Trial. **WILSON v. UNITED COUNTIES BANK, LD.** H. L. (E.) 102

BILL OF EXCHANGE - - - - 683
See BANK.

BILL OF LADING.
See SHIPPING.

BOUNDARIES—Common - - - 271
See COMMON.

BOUNTY—Prize - - - - 403
See PRIZE COURT.

BREACH—C.i.f. contract - - - 144
See SERVICE OUT OF THE JURISDICTION.

BRITISH COLUMBIA.
See CANADA and CROWN.

BRITISH NORTH AMERICA ACT, 1867.
See CANADA.

BRITISH TERRITORY—Waters outside — Accident in - - - - 184
See CANADA.

BURGH ACCOUNTS—Misapplication - 836
See LOCAL GOVERNMENT.

CANADA (BRITISH COLUMBIA)—Insurance (Marine) - - - 162
See INSURANCE (MARINE).

2. — (BRITISH COLUMBIA) — Legislative Power of Province — Workmen's Compensation Act (Brit. Col., 6 Geo. 5, c. 77), Pt. 1, s. 8 (b)—Ship—Seaman — Residence within Province — Accident outside Province — Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, Imp.), s. 503—Canada Shipping Act (R. S. Can., 1906, c. 113), s. 215—British North America Act, 1867 (30 & 31 Vict. c. 3, Imp.), s. 92, head 13. **WORKMEN'S COMPENSATION BOARD v. CANADIAN PACIFIC RY. CO.** - - - J. C. 184

CANADA (BRITISH COLUMBIA)—continued.

3. — (BRITISH COLUMBIA)—Mining Lease — Proviso for Avoidance—Voidable, not Void—Free Miner's Certificate—Placer-Mining Act (R. S. B. C., 1911, c. 165), s. 5. **QUESNEL FORKS GOLD MINING CO. v. WARD** J. C. 222

4. — (BRITISH COLUMBIA)—Railway — Exemption from Taxation—Lands forming Part of Railway — Approval of Plans — Failure to construct Railway. **ARMSTRONG CITY CORPORATION v. CANADIAN NORTHERN PACIFIC RY. CO.** - - - J. C. 216

5. — (BRITISH COLUMBIA) — Registration of Titles — Indefeasible Fee — Refusal to register—Pending Action going to Root of Title—Lis Pendens—Land Registry Act (R. S. B. C., 1911, c. 127), ss. 14, 71. **ESQUIMALT AND NANAIMO RY. CO. v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER CO.** - - - J. C. 172

6. — (BRITISH COLUMBIA)—Vendor and Purchaser — Registration of Titles — Indefeasible Title — Vendor Company — Holding ultra vires — Land Registry Act (R. S. B. C., 1911, c. 127), s. 22. **CREELMAN v. HUDSON BAY INSURANCE CO.** - J. C. 194

7. — (ONTARIO) — Legislative Power — Separate Schools — Application of Funds by — British North American Act, 1867 (30 & 31 Invalid Commission—Validation by Statute Vict. c. 3), s. 93, sub-s. 1. **CITY OF OTTAWA ROMAN CATHOLIC SEPARATE SCHOOLS TRUSTEES v. QUEBEC BANK AND ATT.-GEN. FOR ONTARIO, INTERV.** - - - J. C. 230

— Limitation of action - - - 636
See LIMITATIONS, STATUTES OF.

8. — (ONTARIO)—Municipal Corporation — Executed Contract — Absence of By-law — Municipal Act (R. S. Ont., 1914, c. 192), s. 249. **MACKAY (JOHN) & CO. v. TORONTO CITY CORPORATION** - - - J. C. 208

9. — (ONTARIO) — Railway — Legislative Power of Province — Penalty — Provincial Railway Board — Enforcement of Orders — Construction of Statute—Ontario Railway Act (R. S. Ont., 1914, c. 185), s. 260 (a)—British North America Act (30 & 31 Vict. c. 30, Imp.), s. 92, head 15.

Judgment of the Appellate Division reversed. **TORONTO RY. CO. v. TORONTO CITY CORPORATION, ATT.-GEN. FOR ONTARIO, INTERV** - - - J. C. 446

10. — (ONTARIO) — Railways—Powers of Railway Board—Legislative Power of Dominion—Carrying Highway over Dominion Railways—Apportionment of Cost on Provincial Railway—Right of Appeal to Privy Council—Petition for Special Leave — Inaccuracy — Railway Act (R. S. Can., 1906, c. 37), ss. 46, 59, 237, 238—8 & 9 Edw. 7, c. 32 (Dom.), s. 5—British North America Act, 1867 (30 & 31 Vict. c. 3, Imp.), ss. 91, 92.

CANADA (ONTARIO)—*continued.*

Judgments appealed from affirmed. **TORONTO RY. CO. v. TORONTO CITY CORPORATION** - - - - **J. C. 426**

11. — (ONTARIO) — Street Railway — Removal of Snow — Breach of Statutory Duty — Powers of Railway Board — Non-exclusion of Common Law Action — Ontario Railway Act (R. S. Ont., 1914, c. 185), s. 260.

Judgment of the Appellate Division affirmed. **TORONTO RY. CO. v. TORONTO CITY CORPORATION** - - - - **J. C. 455**

12. — (QUEBEC) — Expropriation — Compensation paid into Court by Agreement — Incidence of Taxation on Money in Court — R. S. Q., 1909, art. 7599.

Judgment of the Superior Court for Quebec affirmed. **MONTREAL CITY v. DUFRESNE** - - - - **J. C. 1017**

13. — (QUEBEC) — Negligence — Onus of Proof — Thing under Defendant's Care — Electricity Supply — Statutory Powers — Civil Code of Quebec, art. 1054.

Judgment of the Supreme Court of Canada affirmed. **QUEBEC RY., LIGHT, HEAT AND POWER CO. v. VANDREY** - - - **J. C. 662**

14. — (QUEBEC) — Pilotage Dues — Quebec Harbour — Right to collect Dues — Corporation of Pilots — Legislative Authority — British North America Act, 1867 (30 & 31 Vict. c. 3, Imp.), ss. 91, 92; 23 Vict. c. 123 (Can.)—4 & 5 Geo. 5, c. 48 (Dom.), ss. 1, 2.

Judgment of the Court of King's Bench for Quebec reversed. **PAQUET v. PILOTS' CORPORATION (QUEBEC)** - - - **J. C. 1029**

15. — (QUEBEC) — Will — Children of deceased Child — Substitution — Construction — Representation — Civil Code of Quebec, art. 980.

Judgment of the Court of King's Bench for Quebec affirmed. **AUGER v. BEAUDRY** - - - **J. C. 1010**

— Undue influence - - - - **349**
See WILL.

16. — (QUEBEC) — Workmen's Compensation — Inexcusable Fault of Employer — Respondent Superior — R. S. Quebec., 1909, art. 7325.

Judgment of the Court of King's Bench affirmed. **MONTREAL TRAMWAYS CO. v. SAVIGNAC** - - - - **J. C. 408**

CANADA—Shipping - - - - **397**
See SHIPPING.

CAPTURE—Enemy ship—Prize Court **1034**
See PRIZE COURT.

CARRIER—Goods — Railway Company — Damage on transit by Water owing to defective Sheeting—Loading and Sheeting performed by Consignors under Arrangement with Railway Company — Authority of Consignor — Liability of Railway Company.

CARRIER—*continued.*

Decision of the Court of Appeal affirmed. **LONDON AND NORTH WESTERN RY. CO. v. HUDSON (RICHARD) & SONS, LD.**

H. L. (E.) 324

2. — Goods—Value and Nature of Goods not declared — Transit partly by Land and partly by Sea—Loss of Goods—Liability of Carrier—Onus of Proof—Carriers Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 68), s. 1. LONDON AND NORTH WESTERN RY. CO. v. ASHTON (J. P.) & Co. - - - **H. L. (E.) 84, 888**

See CONTRACT.

CASES:—

— **Alderman v. Warren** (1916) 9 B. W. C. C. 507, 510.

Dictum of Lord Cozens-Hardy M.R. in, approved. **MANTON v. CANTWELL**

H. L. (Ir.) 781

— **British Columbia Electric Ry. Co. v. Gentile** [1914] A. C. 1034.

Applied. **UNION STEAMSHIP CO. OF NEW ZEALAND v. ROBIN (MARY)**

J. C. 654

— **British Columbia Electric Ry. Co. v. Vancouver, Victoria and Eastern Ry. and Navigation Co.** [1914] A. C. 1067.

Distinguished. **TORONTO RY. CO. v. TORONTO CITY CORPORATION** -

J. C. 426

— **Brown v. Gregson** 1919 S. C. 438.

Reversed. - - - **H. L. (Sc.) 860**

— **Bullivant's Case** [1900] 2 Q. B. 163, 168; [1901] A. C. 196, 203 considered. **O'ROURKE v. DARBISHIRE**

H. L. (E.) 581

— **Bullock v. Downes** (1860) 9 H. L. C. 1. Distinguished. **HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN**

H. L. (E.) 794

— **Canadian Northern Pacific Ry. Co. v. New Westminster Corporation** [1917] A. C. 602.

Explained and applied. **ARMSTRONG CITY CORPORATION v. CANADIAN NORTHERN PACIFIC RY. CO.**

J. C. 216

— **Canadian Pacific Ry. Co. v. Roy** [1902] A. C. 220.

Distinguished. **QUEBEC RY., LIGHT, HEAT AND POWER CO. v. VANDREY**

J. C. 662

— **Collis v. Amphlett** [1918] 1 Ch. 232. Reversed - - - **H. L. (E.) 271**

— **Coltness Iron Co. v. Dobbie** 1919 S. C. 257.

Reversed - - - **H. L. (Sc.) 916**

— **De Keyser's Royal Hotel, Ltd. v. Rex** [1919] 2 Ch. 197.

Affirmed - - - **H. L. (E.) 508**

CASES—continued.

- *Dumphy v. Montreal Light, Heat and Power Co.* [1907] A. C. 454.
Distinguished. QUEBEC RY., LIGHT, HEAT AND POWER CO. v. VANDRY
J. C. 662
- *Ellerman Line, Ltd. v. Grayson (H. & C.), Ltd.* [1919] 2 K. B. 514.
Affirmed - - H. L. (E.) 466
- *Hamilton v. Lord Advocate* 1918 S. C. 135.
Affirmed - - H. L. (Sc.) 50
- *Hansen v. Donaldson* (1874) 1 R. 1066
Explained and distinguished. ALEXANDER (WILLIAM) & SONS v. AKTIESELSKABET DAMPSKIBET HANSA
H. L. (Sc.) 88
- *Helsby, In re* (1914) 84 L. J. (Ch.) 682.
Followed. HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN - H. L. (E.) 794
- *Hutchinson, In re. Carter v. Hutchinson* [1919] 2 Ch. 17.
Reversed - - H. L. (E.) 794
- *Inland Rev. Commrs. v. Northumberland (Duke of)* [1919] 2 K. B. 200.
Affirmed - - H. L. (E.) 825
- *Kemp v. Glasgow Corporation* [1919] S. C. 71.
Reversed - - H. L. (Sc.) 836
- *King v. Port of London Authority* [1918] W. C. & Ins. C. 240.
Reversed. - H. L. (E.) 1
- *London and North Western Ry. Co. v. Ashton (J. P.) & Co.* [1918] 2 K. B. 488.
Affirmed - - H. L. (E.) 84
- *Lord Advocate v. McCulloch* (1895) 22 R. 356.
Approved and followed. HAMILTON v. LORD ADVOCATE H. L. (Sc.) 50
- *Louisiana, The* [1918] A. C. 461, 471.
Applied. THE URNA - J. C. 899
- *Luckie v. Merry* [1915] 3 K. B. 83.
Approved. KING v. PORT OF LONDON AUTHORITY - H. L. (E.) 1
- *M'Alinden v. Nimmo (James) & Co.* 1918 S. C. 329.
Reversed - - H. L. (Sc.) 39
- *McFee, In re* (1910) 79 L. J. (Ch.) 676.
Followed. HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN
H. L. (E.) 794
- *Manton v. Cantwell* [1918] 2 I. R. 563.
Reversed - - H. L. (Ir.) 781
- *Mellish, In re* [1916] 1 Ch. 562.
Followed. HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN
H. L. (E.) 794

CASES—continued.

- *Mersey Docks and Harbour Board v. Liverpool Overseers* (1873) L. R. 9 Q. B. 84:—
Overruled on one point. PORT OF LONDON AUTHORITY v. ORSETT UNION ASSESSMENT COMMITTEE
H. L. (E.) 273
- *Mortimore v. Mortimore* (1879) 4 App. Cas. 448.
Distinguished. HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN
H. L. (E.) 794
- *Mussoorie Bank v. Raynor* (1882) 7 App. Cas. 321.
Observations in, reaffirmed. TORONTO RY. CO. v. TORONTO CITY CORPORATION - J. C. 426
- *Netherseal Colliery Co. v. Bourne* (1889) 14 App. Cas. 228.
Distinguished. COLTNESS IRON CO. v. DOBBIE - H. L. (Sc.) 916
- *Noordam, The* [1919] P. 255.
Varied - - J. C. 904
- *North Staffordshire Ry. Co. v. Edge* [1919] 1 K. B. 367
Affirmed - - H. L. (E.) 254
- *Northfield Steamship Co. v. Compagnie L'Union des Gaz* [1912] 1 K. B. 434, 440, 441.
Dicta of Cozens-Hardy M.R. and Farwell L.J. in, approved. ALEXANDER (WILLIAM) & SONS v. AKTIESELSKABET DAMPSKIBET HANSA
H. L. (E.) 88
- *O'Rourke v. Darbishire* [1919] 1 Ch. 320.
Affirmed - - H. L. (E.) 581
- *Oscar II., The* [1919] P. 171.
Affirmed - - J. C. 748
- *Port of London Authority v. Orsett Union Assessment Committee* [1919] 2 K. B. 1.
Reversed - - H. L. (E.) 273
- *Postlethwaite, In re* (1887) 35 Ch. D. 722. Considered and explained. O'ROURKE v. DARBISHIRE
H. L. (E.) 581
- *Redford v. Armstrong, Whitworth & Co.* [1919] W. N. 153.
Affirmed. - - H. L. (E.) 757
- *Rex v. Meade* [1909] 1 K. B. 895.
Rule laid down in, commented on. DIRECTOR OF PUBLIC PROSECUTIONS v. BEARD H. L. (E.) 479
- *Rolin v. Steward* (1854) 14 C. B. 595.
Applied. WILSON v. UNITED COUNTIES BANK, LD. - H. L. (E.) 102
- *Schlesien, The* [1916] P. 225.
Distinguished. THE ORTERIC
J. C. 724

CASES—continued.

- *Stubbs, Ld. v. Russell* [1913] A. C. 386
Distinguished. *STUBBS, LD. v. MAZURE* - - **H. L. (Sc.) 66**
- *Sturge and Great Western Ry. Co.* (1882) 19 Ch. D. 444. Followed.
HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN - - **H. L. (E.) 794**
- *Toronto Corporation v. Canadian Pacific Ry. Co.* [1908] A. C. 54.
Applied. *TORONTO RY. CO. v. TORONTO CITY CORPORATION*
J. C. 426
- *Ward v. Weeks* (1830) 7 Bing. 211.
Approved. *WELD-BLUNDELL v. STEPHENS* - - **H. L. (E.) 956**
- *Waterous Engine Co. v. Corporation of Palmerston* (1892) 21 Can. S. C. R. 556.
Approved. *MACKAY (JOHN) & CO. v. TORONTO CITY CORPORATION*
J. C. 208
- *Weld-Blundell v. Stephens* [1919] 1 K. B. 520.
Affirmed - - **H. L. (E.) 956**
- *Wharton v. Barker* (1858) 4 K. & J. 483.
Followed. *HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN*
H. L. (E.) 794
- *Wilson, In re* [1907] 2 Ch. 572.
Distinguished. *HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN*
H. L. (E.) 794
- *Young v. Corporation of Leamington* (1883) 8 App. Cas. 517.
Applied. *MACKAY (JOHN) & CO. v. TORONTO CITY CORPORATION*
J. C. 208
- *Zamora, The* [1916] 2 A. C. 77.
Observations in, followed. *THE OSCAR II.* - - **J. C. 748**
- CANTEEN**—Injury on returning to work from.
See **WORKMEN'S COMPENSATION.**
- CAPTURE**—Negligence in effecting—Prize Court - - - - **748**
See **PRIZE COURT.**
- CASUAL LABOURER** - - - - **781**
See **WORKMEN'S COMPENSATION.**
- CAUSE OF ACTION**—Sale of goods—C.i.f. contract - - - - **144**
See **SERVICE OUT OF THE JURISDICTION.**
- CEYLON** — *Roman-Dutch Law* — *Grantor without Title—Title acquired after Grant—Feeding Estoppel—Registration of Deeds.*
RAJAPAKSE v. FERNANDO - - **J. C. 892**
- CHARTERPARTY.**
See **SHIPPING.**

- CHEQUE**—Crossed - - - - **683**
See **BANK.**
- CHILDREN**—Adoption of—New Zealand
See **NEW ZEALAND** - - **198**
- CLAIM**—Compensation - - - - **1**
See **WORKMEN'S COMPENSATION.**
- CLASS**—Period of ascertaining - - **794**
See **WILL.**
- COAL MINES** - - - - **916**
See **MINES.**
- COLLISION**—Shipping - - - - **397**
See **SHIPPING.**
- COLONIES.**
See **AUSTRALIA, CANADA, CYPRUS, HONGKONG, NEW ZEALAND, SOUTH AFRICA, STRAITS SETTLEMENTS, and TRINIDAD.**
- COMMON**—*Encroachment — Boundaries — Ditch Width—Presumption of Ownership.*
Order of the Court of Appeal [1918] 1 Ch. 232 reversed on the evidence and judgment of Younger J. restored. *COLLIS v. AMPHLETT*
H. L. (E.) 271
- COMMON EMPLOYMENT** - - - - **654**
See **NEW ZEALAND.**
- COMPENSATION**—Crown.
See **CROWN.**
- *Workmen's.*
See **NEW ZEALAND and WORKMEN'S COMPENSATION.**
- COMPROMISE**—Railway—Rates — Increase — Inequality of charge - - **254**
See **RAILWAY.**
- CONCLUSIVENESS**—Affidavit - **581**
See **DISCOVERY.**
- CONDEMNATION**—Prize Court - - **718**
See **PRIZE COURT.**
- CONDITIONAL CONTRABAND** - - **899**
See **PRIZE COURT.**
- CONFIDENTIAL COMMUNICATIONS**
581, 956
See **DISCOVERY and PRINCIPAL AND AGENT.**
- CONSIGNMENT** - - - - **899**
See **CARRIER and PRIZE COURT.**
- CONSTITUTIONAL LAW**—Power of Colonial Legislature - - - - **691**
See **AUSTRALIA (QUEENSLAND).**
- CONSTRUCTION**—Commission—Judge **691**
See **AUSTRALIA (QUEENSLAND).**
- *Policy.*
See **INSURANCE (MARINE).**
- *Statute.*
See **CANADA and NEW ZEALAND.**
- *Will* - - - - **794**
See **WILL.**

- CONTRABAND**—Conditional - - - 899
See PRIZE COURT.
- CONTRACT**—*Illegality by Foreign Law* —
Shipping — *Agreement to pay Rebates on*
Freights—*Performance of Contract of Carriage*
—*Liability to pay Rebates. TRINIDAD SHIP-*
PING AND TRADING Co. v. ALSTON (G. R.) &
Co. - - - - - J. C. 888
- Sale of goods—C.i.f. contract - 144
See SERVICE OUT OF THE JURIS-
DICTION.
- Seal not under—Municipal corporation
See CANADA. 208
- C.I.F. CONTRACT**—Sale of goods - 144
See SERVICE OUT OF THE JURIS-
DICTION.
- CONTRIBUTORY NEGLIGENCE** - 486
See NEGLIGENCE.
- COSTS**—Taxation — Pauper — Appeal to
House of Lords - - - 39
See WORKMEN'S COMPENSATION.
- CREDIT**—Injury to - - - 66, 102
See BANKRUPTCY and DEFAMATION.
- CRIMINAL LAW**—*Murder* — *Manslaughter*
— *Act of Violence done in furtherance of Rape*
— *Plea of Drunkenness*—*Misdirection.*
Decision of the Court of Criminal Appeal
reversed. DIRECTOR OF PUBLIC PROSECU-
TIONS v. BEARD - - - H. L. (E.) 479
- CROSSED CHEQUE** - - - 683
See BANK.
- CROWN**—*Defence of the Realm* — *War* —
Exigencies of the Public Service—*Royal Pro-*
rogative — *Right of Crown to take Possession*
of Land and Buildings without Compensation
— *Defence Act, 1842 (5 & 6 Vict. c. 94), s. 19*
— *Defence of the Realm Consolidation Act,*
1914 (5 Geo. 5, c. 8), s. 1, sub-ss. 1 and 2, and
Regulations thereunder.
Decision of the Court of Appeal [1919] 2 Ch.
197 affirmed. ATT.-GEN. v. DE KEYSER'S
ROYAL HOTEL, LD. - - - H. L. (E.) 508
2. — Procedure — Parties — Attorney-
General — Joinder as a Defendant — Action
which may affect Crown Right. ESQUIMALT
AND NANAIMO RY. CO. v. WILSON - J. C. 358
- CUSTOM**—Port of Hull - - - 239
See SHIPPING.
- CUSTOMARY STEAMSHIP DESPATCH** 239
See SHIPPING.
- CUSTOMER**—Bank - - - 683
See BANK.
- CYPRUS**—*Land Tenure* — *Arazi Mirie* —
Rights of Tenants—*Sinking and connecting*
Wells—*Permission of Government. TSINKI v.*
KING'S ADVOCATE - - - J. C. 743
- DAMAGES**—*Death*—*Negligence* - 654
See NEW ZEALAND.
- Injury to credit and reputation —
Action by bankrupt. - - - 102
See BANKRUPTCY.
- Remoteness—Principal and agent 956
See PRINCIPAL AND AGENT.
- DEATH**—*Damages*—*Negligence* - 654
See NEW ZEALAND.
- DECLARATION OF LONDON**—Order in
Council No. 2 of October 29, 1914
See PRIZE COURT. 899
- DECREES IN ABSENCE**—List of—Libel 66
See DEFAMATION.
- DEDUCTION**—*Income tax*—*Excess mineral*
rights duty - - - 825
See REVENUE.
- Rating - - - 273
See RATES.
- Wages — Coal mines — Payment by
weight of mineral - - - 916
See MINES.
- DEEDS**—Registration - - - 892
See CEYLON.
- DEFAMATION**—*Libel* — *Innuendo*—*Rele-*
vancy — *Newspaper* — *Trade Publication*—
List of Decrees in Absence—*Erroneous Entry*
— *Imputation affecting Credit. STUBBS, LD.*
v. MAZURE - - - H. L. (Sc.) 66
See PRINCIPAL AND AGENT.
- DEFENCE OF THE REALM** - - - 508
See CROWN.
- DEMURRAGE** - - - 88, 239
See SHIPPING.
- DEPORTATION ORDER**—British subject —
Want of particularity in charge 735
See HONG KONG.
- DEVOLUTION**—*Succession duty* - - - 50
See REVENUE.
- DISCHARGE**—Ship - - - 88, 239
See SHIPPING.
- DISCOVERY**—*Documents* — *Privilege*—*Soli-*
citor Trustee acting for Self and Co-trustees —
Confidential Communications — *Fraud* —
Sufficiency of Allegation — *Protection of*
Documents relating to Possessor's own Case—
Conclusiveness of Affidavit — *Trustee and*
cestui que trust — *Production of Documents on*
Ground of proprietary Right. O'ROURKE v.
DARBISHIRE - - - H. L. (E.) 581
- DISPOSITION**—*Succession duty* - - - 50
See REVENUE.
- DISTRIBUTION**—*Statutes of* - - - 794
See WILL.
- DITCH WIDTH**—*Presumption of ownership*—
Common — *Encroachment* —
Boundaries - - - 271
See COMMON.

- DOCK**—Dry—Hire of — Agreement to insure against marine risks—Sinking in harbour - - - 162
See INSURANCE (MARINE).
— Rating - - - 273
See RATES.
- DOCUMENTS**—Discovery - - - 581
See DISCOVERY.
- DRUNKENNESS**—Plea of - - - 479
See CRIMINAL LAW.
- DUTY**—Principal and agent—Secrecy - 956
See PRINCIPAL AND AGENT.
— Revenue.
See REVENUE.
- ELECTION**—Trust Disposition comprising Foreign Land—Prohibition of Trusts by the *lex situs*—Beneficiaries entitled by Devolution of Law—Impossibility of surrender to Trusts of Will.
Decision of the First Division of the Court of Session in Scotland 1919 S. C. 71 reversed.
BROWN v. GREGSON - - H. L. (Sc.) 860
- ELECTIONEERING EXPENSES**—Municipal elections—Payment of - - 836
See LOCAL GOVERNMENT.
- ELECTRICITY SUPPLY** - - - 662
See CANADA (QUEBEC).
- EMPLOYMENT.**
See WORKMEN'S COMPENSATION.
- ENCROACHMENT**—Common - - 271
See COMMON.
- ENEMY**—Prize Court.
See PRIZE COURT.
- ENTAIL**—Succession duty - - 50
See REVENUE.
- ESTOPPEL**—Feeding - - - 892
See CEYLON.
- EVIDENCE**—Carrier - - - 84
See CARRIER.
— Common—Boundaries - - 271
See COMMON.
— Will—Undue influence—Onus of proof - - - 349
See WILL.
- EXCESS MINERAL RIGHTS DUTY** - 825
See REVENUE.
- EXECUTED CONTRACT**—Municipal Corporation - - - 208
See CANADA.
- EXEMPTION** — Taxation — Railway — Canada (British Columbia) - 216
See CANADA.
- EXPROPRIATION**—Canada (Quebec) - 1017
See CANADA (QUEBEC).
- FIDUCIARY RELATIONSHIP** - - 636
See LIMITATIONS, STATUTES OF.
- "FINAL PORT"** - - - 307
See INSURANCE (MARINE).
- FINANCE ACTS** - - - 50
See REVENUE.
- FIRE**—Damage to ship by - - 466
See NEGLIGENCE.
- FOREIGN LAND**—Election - - 860
See ELECTION.
- FOREIGN LAW**—Illegality by - - 888
See CONTRACT.
- FORM**—Order—Workmen's compensation.
See WORKMEN'S COMPENSATION.
- FRAUD**—Sufficiency of allegation - 581
See DISCOVERY.
- FREE MINER'S CERTIFICATE** — British Columbia - - - 222
See CANADA.
- FREIGHT**—Agreement to pay rebates - 888
See CONTRACT.
- GOODS**—Carriage of.
See CARRIER.
— Prize Court.
See PRIZE COURT.
— Sale of.
See SERVICE OUT OF THE JURISDICTION.
- HAGUE CONVENTION** - - - 904
See PRIZE COURT.
- HONG KONG** — Deportation Order—British Subject—Want of Particularity in Charge — Deportation Ordinance, 1917 (No. 25 of 1917), s. 4, sub-s. 14. LI HONG MI v. ATT.-GEN. FOR HONG KONG - - - J. C. 735
- HULL**—Port of—Custom - - - 239
See SHIPPING.
- HUSBAND**—Wife's will—Husband sole beneficiary—Onus of proof - - 349
See WILL.
- HYPOTHETICAL TENANT**—Rating - 273
See RATES.
- ILLEGALITY**—Foreign law - - 888
See CONTRACT.
- INCAPACITY**—Workmen's compensation 1, 39
See WORKMEN'S COMPENSATION.
- INCREASE**—Rates—Railway - - 254
See RAILWAY.
- INDEFEASIBLE TITLE**—Registration
See CANADA. 172, 194
- INEQUALITY**—Charge—Railway - 254
See RAILWAY.
- INFLAMMABLE CARGO**—Negligence—Contributory negligence—Ship repairers
See NEGLIGENCE - - - 466
- INJURY**—Workmen's compensation.
See WORKMEN'S COMPENSATION.

- INNUENDO**—Libel - - - 66
See DEFAMATION.
- INSURANCE (MARINE)**—*Hire of Dry Dock*
 — *Agreement to insure against Marine Risks—*
Sinking in Harbour—Absence of Marine
Risk. GRANT, SMITH & Co. AND McDONNELL,
 LD. *v.* SEATTLE CONSTRUCTION AND DRY
 DOCK Co. - - - - J. C. 162
2. — *Ship — “Final Port” — Lloyd’s*
Policy—Method of Construction.
 Decision of the Court of Appeal reversed.
 MARTEN *v.* VESTEX BROTHERS, LD.
 H. L. (E.) 307
- JAMAICA**—Appeal - - - 1025
See JUDICIAL COMMITTEE.
- JOINDER**—Parties - - - 358
See CROWN.
- JUDGE**—Queensland — Constitution—Judge
 of Court - - - 691
See AUSTRALIA (QUEENSLAND).
- JUDICIAL COMMITTEE**—Appeal — *New*
Trial — Excessive Damages — Verdict of
Jury—Weight of Majority Verdict.
 Judgment of Court of Appeal of Jamaica
 affirmed. WEST INDIA ELECTRIC Co. *v.*
 ROBERTS - - - - J. C. 1025
2. — *Appeal — Special Leave—Failure*
to mention material Statute—Rescission of
Order—Practice. EMERSON-BRANTINGHAM
 IMPLEMENT Co. *v.* SCHOFIELD - J. C. 415, 426
See AUSTRALIA, CANADA, CEYLON,
 CONTRACT, CYPRUS, HONG KONG,
 NEW ZEALAND, PRIZE COURT,
 SOUTH AFRICA, and TRINIDAD.
- JURISDICTION** — Arbitrator — Award —
 Workmen’s compensation - 1
See WORKMEN’S COMPENSATION.
- Service out of the - - - 144
See SERVICE OUT OF THE JURIS-
 DICTION.
- JURY**—Verdict — Weight of majority ver-
 dict - - - 1025
See JUDICIAL COMMITTEE.
- LABOUR**—Shortage of - - - 88
See SHIPPING.
- LAND**—Buildings—Right of Crown to take
 possession of, without compensation
See CROWN. 508
- Carriage of goods by - - - 84
See CARRIER.
- Railway - - - 216
See CANADA.
- Registry - - - 172, 194
See CANADA.
- LATENT INJURY**—Workmen’s compensa-
 tion - - - 1
See WORKMEN’S COMPENSATION.
- LAW**—Point of not raised at trial - 254
See RAILWAY.
- LEGISLATIVE POWER**—Province
 184, 230, 420, 446, 1029
See CANADA and SOUTH AFRICA.
- LETTER MAIL**—Seizure from - - 904
See PRIZE COURT.
- LEX SITUS**—Prohibition of trusts by the
See ELECTION. 836
- LIBEL**—Innuendo - - - 66
See DEFAMATION.
- Repetition - - - 956
See PRINCIPAL AND AGENT.
- LIMITATION**—Liability - - - 397
See SHIPPING.
- LIMITATIONS, STATUTES OF**—*Trustee—*
Fiduciary Relationship — Retaining Trust
Property — Canada (Ontario)—Limitations
Act (R. S. Ont., 1914, c. 75), ss. 5, 47. TAY-
 LOR (ISABELLA) *v.* DAVIES - - J. C. 636
- LIS PENDENS**—Registration of titles - 172
See CANADA.
- LOYD’S POLICY**—Insurance (Marine) 307
See INSURANCE (MARINE).
- LOADING**—Goods—Carriage - - 324
See CARRIER.
- LOCAL GOVERNMENT**—*Burgh Accounts —*
Common Good — Misapplication—Ultra vires
—Municipal Elections—Payment of Election-
eering Expenses in adjoining Constituencies.
 Decision of the First Division of the Court
 of Session in Scotland 1919 S. C. 71 re-
 versed. KEMP *v.* GLASGOW CORPORATION
 H. L. (Sc.) 836
- LOSS**—Goods—Liability of carrier - 84
See CARRIER.
- MAJORITY VERDICT**—Jury—Weight of
See JUDICIAL COMMITTEE. 1025
- MANSLAUGHTER** - - - 479
See CRIMINAL LAW.
- MAORI**—Adoption of European child—New
 Zealand - - - 198
See NEW ZEALAND.
- MARINE INSURANCE.**
See INSURANCE (MARINE).
- MARINE RISK** - - - 162
See INSURANCE (MARINE).
- MERCHANT SHIPPING ACT, 1894** - 184
See CANADA.
- MINES**—*Coal Mines — Wages — Payment*
by Weight of Mineral—Deductions—Mineral
contracted to be gotten—Coal Mines Regulation
Act, 1887 (50 & 51 Vict. c. 58), s. 12, sub-s. 1.
 Interlocutor of the Second Division of the
 Court of Session in Scotland 1919 S. C. 257
 reversed. COLTNESS IRON Co. *v.* DOBBIE
 H. L. (Sc.) 916
- MINING LEASE**—British Columbia - 222
See CANADA.

- MISAPPLICATION** — Burgh accounts —
Common good - - - 836
See LOCAL GOVERNMENT.
- MISDIRECTION**—Criminal law - - 479
See CRIMINAL LAW.
- MUNICIPAL CORPORATION** — Contract not
under seal - - - 208
See CANADA.
- MURDER** - - - 479
See CRIMINAL LAW.
- NAVAL PRIZE ACT, 1864** - - 403
See PRIZE COURT.
- NEGATIVE PROVISION** — Omission of —
Statute—Amended section - 654
See NEW ZEALAND.
- NEGLIGENCE**—Bank - - - 102, 683
See BANK and BANKRUPTCY.
2. — *Contributory Negligence—Ship Repairers — Inflammable Cargo — Damage to Ship by Fire.*
Decision of the Court of Appeal [1919]
2 K. B. 514 affirmed. GRAYSON (H. & C.),
LD. v. ELLERMAN LINE, LD. H. L. (E.) 466
- Death—Damages - - - 654
See NEW ZEALAND.
- Onus of proof - - - 662
See CANADA (QUEBEC).
- Prize Court - - - 748
See PRIZE COURT.
- NEUTRAL**—Prize Court.
See PRIZE COURT.
- NEW SOUTH WALES.**
See AUSTRALIA and BANK.
- NEW TRIAL**—Point of law not taken at trial
See BANKRUPTCY. 102
- NEW ZEALAND**—Adoption—*Maori Adoption of European Child—Right of Succession—Adoption of Children Act (No. 8 of 1895), s. 7—Native Land Claims Adjustment and Laws Amendment Act (No. 65 of 1901), s. 50.*
ARANI (HINEITI RIRERIRE) v. PUBLIC TRUSTEE OF NEW ZEALAND. LINDSAY (MATILDA) AND ARANI (WHAITIKITIKI), INTERV. J. C. 198
2. — *Negligence — Death — Damages—Common Employment — Construction of Statute — Amended Section—Omission of Negative Provision — Deaths by Accident Compensation Act, 1908 (No. 39), ss. 3, 5—Workers' Compensation Act, 1908 (No. 248), s. 62 — Workers' Compensation Amendment Act, 1911 (No. 34), s. 13.* UNION STEAMSHIP CO. OF NEW ZEALAND v. ROBIN (MARY)
J. C. 654
- NEWSPAPER**—Libel—Innuendo - 66
See DEFAMATION.
- NEXT OF KIN**—Gift to - - - 794
See WILL.
- NOVA SCOTIA**—Prize Court - - 718
See PRIZE COURT.
- NOVUS ACTUS INTERVENIENS** — Libel —
Principal and agent - - - 956
See PRINCIPAL AND AGENT.
- ONTARIO.**
See LIMITATIONS, STATUTES OF, and CANADA.
- ONUS OF PROOF** - - - 84, 349, 662
See CANADA (QUEBEC), CARRIER, and WILL.
- ORDER** — Form — Workmen's compensation - - - 1
See WORKMEN'S COMPENSATION.
- ORDERS IN COUNCIL** 899, 904
See PRIZE COURT.
- PARTIAL INCAPACITY** — Workmen's compensation - - - 39
See WORKMEN'S COMPENSATION.
- PARTIES**—Attorney-General - - 358
See CROWN.
- PAUPER**—Appellant—Costs - - 39
See WORKMEN'S COMPENSATION.
- PAYMENT**—Wages — Coal mines—Weight of mineral - - - 916
See MINES.
- PENANG.**
See STRAITS SETTLEMENTS.
- PENDING ACTION**—Going to root of title—Registration of titles - - 172
See CANADA.
- PILOTAGE DUES**—Quebec harbour - 1029
See CANADA (QUEBEC).
- POLICY**—Marine insurance.
See INSURANCE (MARINE).
- PORT**—Custom of - - - 239
See SHIPPING.
- POSTAL CORRESPONDENCE**—Securities
See PRIZE COURT. 904
- PRACTICE**—Appeal.
See RAILWAY.
- Judicial Committee.
See JUDICIAL COMMITTEE.
- Parties.
See CROWN.
- Service out of the jurisdiction
See SERVICE OUT OF THE JURISDICTION.
- "PREDECESSOR"** - - - 50
See REVENUE.
- PRESUMPTION** — Ownership — Common —
Encroachment—Boundaries—Ditch width - - - 271
See COMMON.
- PRINCIPAL AND AGENT** — Confidential Instructions — Duty of Secrecy — Breach of Duty — Damages—Remoteness—Libel—Repetition of Libel—*Novus actus interveniens.*
Decision of the Court of Appeal [1919]
1 K. B. 520 affirmed. WELD-BLUNDELL v. STEPHENS - - - H. L. (E.) 956

- PRIVILEGE**—Discovery—Documents - 581
See DISCOVERY.
- PRIVY COUNCIL**—Appeals.
See AUSTRALIA, CANADA, CEYLON,
CONTRACT, CYPRUS, HONG KONG,
NEW ZEALAND, and PRIZE COURT.
- PRIZE COURT**—Conditional Contraband—
Neutral Port—Consignment to selling Agent
—Advances by Agent—“The Consignee of
the Goods”—Order in Council of October 29,
1914, cl. 1 (iii.).
Judgment of the Prize Court affirmed.
THE URNA - - - - J. C. 899
2. — Enemy Goods — Passing of Pro-
perty after Seizure — “Sale” of Draft to
Bankers.
Judgment of the Prize Court reversed.
THE ORTERIC - - - - J. C. 724
3. — Negligence in effecting Capture—
Loss of Goods—Action against Procurator-
General—Liability—Prize Court Rules,
1914, Order II., r. 3.
Judgment of the Prize Court [1919] P. 171
affirmed. THE OSCAR II. - - - J. C. 748
4. — Neutral Ship — Enemy Stowaway
—Unneutral Service—Absence of Facts
justifying Condemnation.
Judgment of the Prize Court reversed.
THE SVITHIOD - - - - J. C. 718
5. — Neutral Territorial Waters —
Enemy Ship—Capture—Claim by Neutral
Government—Restitutio in Integrum.
Judgment of the Prize Court varied. THE
DÜSSELDORF - - - - J. C. 1034
6. — Prize Bounty — Destruction of
Enemy Transport—Enemy “armed ship” —
Naval Prize Act, 1864 (27 & 28 & Vict. c. 25),
s. 42. H.M. SUBMARINE E 14 - - J. C. 403
7. — Securities — Seizure from Letter
Mail — “Goods” — “Enemy property” —
“Enemy origin”—Hague Convention No. 11,
art. 1—Reprisals Order in Council of
March 11, 1915, art. 4.
Judgment of the Prize Court [1919] P. 255
varied. THE NOORDAM (No. 2) - - J. C. 904
- PROCURATOR-GENERAL**—Action against
See PRIZE COURT. - - - - 748
- PROFITS**—Rating - - - - 273
See RATES.
- PROOF**—Onus of - - - - 84, 349, 662
See CANADA (QUEBEC), CARRIER, and
WILL.
- PROVINCE**—Legislative power of
184, 230, 420
See CANADA and SOUTH AFRICA.
- QUEBEC.**
See CANADA.
- QUEENSLAND.**
See AUSTRALIA.
- RAILWAY**—Canada (British Columbia) —
Exemption from taxation - 216
See CANADA.
- Carriage of goods.
See CARRIER.
2. — Rates — Increase — Inequality of
Charge — Compromise — Railways Clauses
Consolidation Act, 1845 (8 & 9 Vict. c. 20),
s. 90—Appeal—Practice—Point of Law not
raised at Trial.
Decision of the Court of Appeal [1919]
1 K. B. 367 affirmed. NORTH STAFFORDSHIRE
RY. CO. v. EDGE - - - H. L. (E.) 254
- RAPE**—Act of violence done in furtherance of
See CRIMINAL LAW - - - 479
- RATE**—Succession duty - - - 50
See REVENUE.
- RATES**—Docks—Statutory Authority—Re-
strictions on the Application of Profits—
Annual Value—Hypothetical Tenant—De-
duction in respect of Tenant's Profits—
Parochial Assessments Act, 1836 (6 & 7
Will. 4, c. 96), s. 1—Port of London Act,
1908 (8 Edw. 7, c. 68), s. 21.
Decision of the Court of Appeal [1919]
2 K. B. 1 reversed. PORT OF LONDON
AUTHORITY v. ORSETT UNION ASSESSMENT
COMMITTEE - - - - H. L. (E.) 273
- Railway - - - - 254
See RAILWAY.
- REASONABLE CAUSE**—Failure to make
claim within specified period —
Workmen's compensation - 1
See WORKMEN'S COMPENSATION.
- REBATES**—Freights—Agreement to pay
See CONTRACT. 888
- REGISTRATION**—Deeds - - - 892
See CEYLON.
- Titles - - - - 172, 194
See CANADA.
- RENT VALUE**—Pre-war—Excess mineral
rights duty - - - - 825
See REVENUE.
- REPRISALS ORDER IN COUNCIL** - 904
See PRIZE COURT.
- RESCISSION**—Order—Judicial Committee
See JUDICIAL COMMITTEE. 415
- RESTITUTIO IN INTEGRUM**—Prize Court.
See PRIZE COURT. 1034
- REVENUE**—Excess Mineral Rights Duty—
Method of Computation — Pre-war Rent
Value — Deduction of Income Tax—Finance
(No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89),
s. 43, sub-s. 1, 2.
Decision of the Court of Appeal [1919]
2 K. B. 200 affirmed. NORTHUMBERLAND
(DUKE OF) v. INLAND REV. COMMRs.
H. L. (E.) 825

2. — *Succession Duty* — *Rate of Duty*
— *Entail* — “*Predecessor*” — *Succession*
whether by Reason of a Disposition or by De-
volution—*Succession Duty Act, 1853 (16 & 17*
Vict. c. 51), s. 2—Finance (1909-10) Act,
1910 (10 Edw. 7, c. 8), s. 58, sub-ss. 1 and 4.
HAMILTON v. LORD ADVOCATE

H. L. (Sc.) 50

REVIEW — *Weekly payment* — *Workmen's*
compensation - - - - - 39
See WORKMEN'S COMPENSATION.

ROMAN-DUTCH LAW - - - - - 892
See CEYLON.

ROYAL PREROGATIVE - - - - - 508
See CROWN.

RULES AND ORDERS:—

— *Coal Mines (Explosives) Order, Sep-*
tember, 1913, Pt. I., paras. 2 (c), 3 (c):
BOURTON v. BEAUCHAMP

H. L. (E.) 1001

— *Hague Convention, No. 11, art. 1: THE*
NOORDAM No. 2 - - - - - J. C. 904

— *Order in Council of June 6, 1859:*
MCCAWLEY v. REX - - - - - J. C. 691

— *Order in Council of October 29, 1914*
(Declaration of London), cl. 1 (iii.):
THE URNA - - - - - J. C. 899

— *Order in Council of March 11, 1915*
(Reprisals), art. 4: THE NOORDAM
J. C. 904

— *Prize Court Rules, 1914, Order II., r. 3:*
THE OSCAR II. - - - - - J. C. 748

— *Supreme Court Rules of the Order XI.,*
r. 1 (e): JOHNSON v. TAYLOR BROS.
& Co. - - - - - H. L. (E.) 144

SALE—*Draft*—*Bankers* - - - - - 724
See PRIZE COURT.

— *Ship*—*Proceeds of* - - - - - 397
See SHIPPING.

SALE OF GOODS—*C.i.f. contract*—*Breach*
144
See SERVICE OUT OF THE JURIS-
DICTION.

SCOTTISH APPEAL—*Costs*—*Pauper appel-*
lant - - - - - 39
See WORKMEN'S COMPENSATION.

SEA—*Carriage of goods by* - - - - - 84
See CARRIER.

SEAL — *Contract* — *Not under* — *Municipal*
corporation - - - - - 208
See CANADA.

SEAMAN—*Residence within province of*
British Columbia — *Accident out-*
side province - - - - - 184
See CANADA.

SECURITIES—*Seizure* - - - - - 904
See PRIZE COURT.

SEIZURE—*Letter mail* - - - - - 904
See PRIZE COURT.

SELLING AGENT—*Consignment to* — *Ad-*
vances by - - - - - 899
See PRIZE COURT.

SEPARATE SCHOOLS—*Canada (Ontario)*
See CANADA. 230

SERVICE OUT OF THE JURISDICTION—
Writ—“*Contract to be performed within the*
jurisdiction”—*Sale of Goods*—*C.i.f. Con-*
tract—*Breach*—*Cause of Action*—*Failure to*
ship—*Failure to tender Shipping Documents*
—*Practice*—*Rules of the Supreme Court*
Order XI., r. 1 (e). JOHNSON v. TAYLOR BROS.
& Co. - - - - - H. L. (E.) 144

SHEETING—*Defective*—*Damage on transit*
by water owing to - - - - - 324
See CARRIER.

SHIPPING—*Charterparty*—*Bill of Lading*—
Incorporation of Charterparty—*Obligation to*
Discharge with customary Steamship Dispatch
but according to Custom of Port—*Custom of*
Port of Hull—*Demurrage.*

Order of the Court of Appeal affirmed.
VAN LIEUWEN v. HOLLIS BROS. & Co.

H. L. (E.) 239

2. — *Charterparty* — *Demurrage*—*Fixed*
Rate of Discharge provided Steamer can dis-
charge at that Rate—*Delay due to Shortage of*
Labour. ALEXANDER (WILLIAM) & SONS v.
AKTESSELSKABET DAMPSKIBET HANSA

H. L. (Sc.) 88

3. — *Collision*—*Proceeds of sale of Ship*
to blame—*Absence of Limitation Proceedings*
— *Division between Claimants*—*Merchant*
Shipping Act, 1894 (57 & 58 Vict. c. 60,
Imp.), ss. 503, 504. CANADIAN PACIFIC RY.
Co. v. S.S. STORSTAD - - - - - J. C. 397

— *Freight* - - - - - 888
See CONTRACT.

— *Insurance.*
See INSURANCE (MARINE).

— *Prize Court.*
See PRIZE COURT.

— *Seaman* — *Residence within province*
of British Columbia—*Accident out-*
side province - - - - - 184
See CANADA.

SHIPPING DOCUMENTS—*Failure to tender*
144
See SERVICE OUT OF THE JURIS-
DICTION.

SHIP REPAIRERS—*Inflammable cargo* 466
See NEGLIGENCE.

SOLICITOR—*Trustee* - - - - - 581
See DISCOVERY.

SOUTH AFRICA—*Legislative Power of Pro-*
vince—*Municipal Rates*—*Ultimate Burden*—
Invalidation of Contracts—*South Africa Act,*
1900 (9 Edw. 7, c. 9, Imp.), s. 85 (vi.). MAR-
SHALL'S TOWNSHIP SYNDICATE, LD. v. JO-
HANNESBURG CONSOLIDATED INVESTMENT CO.
J. C. 420

SPECIAL DAMAGE—Right of action - 102
See **BANKRUPTCY**.

SPECIAL LEAVE—Appeal—Judicial Committee - - - 415, 426
See **JUDICIAL COMMITTEE**.

STATUTE—Validation by—Application of funds by invalid Commission — Canada (Ontario) - - - 230
See **CANADA**.

STATUTES :—

I. IMPERIAL.

1830.

11 Geo. 4 & 1 Will. 4, c. 68 (Carriers), s. 1 : LONDON AND NORTH WESTERN RY. CO. v. ASHTON (J. P.) & Co. - **H. L. (E.) 84**

1836.

6 & 7 Will. 4, c. 96 (Parochial Assessments), s. 1 : PORT OF LONDON AUTHORITY v. ORSETT UNION ASSESSMENT COMMITTEE - - - **H. L. (E.) 273**

1842.

5 & 6 Vict. c. 94 (Defence), s. 19 : ATT-GEN. v. DE KEYSER'S ROYAL HOTEL, LD. - - **H. L. (E.) 508**

1845.

8 & 9 Vict. c. 20 (Railways Clauses Consolidation), s. 90 : NORTH STAFFORDSHIRE RY. CO. v. EDGE - **H. L. (E.) 254**

1853.

16 & 17 Vict. c. 51 (Succession Duty), s. 2 : HAMILTON v. LORD ADVOCATE - **H. L. (Sc.) 50**

1864.

27 & 28 Vict. c. 25 (Naval Prize), s. 42 : H.M. SUBMARINE E14 - **J. C. 403**

1865.

28 & 29 Vict. c. 63 (Colonial Laws Validity), s. 5 : McCawley v. REX **J. C. 691**

1867.

30 & 31 Vict. c. 3, (British North America), ss. 91, 92 : PAQUET v. PILOTS' CORPORATION (QUEBEC) - **J. C. 1029**

TORONTO RY. CO. v. TORONTO CITY CORPORATION - - **J. C. 426**

- - - s. 92, head 13 : WORKMEN'S COMPENSATION BOARD v. CANADIAN PACIFIC RY. CO. - - **J. C. 184**

- - - head 15 : TORONTO RY. CO. v. TORONTO CITY CORPORATION - **J. C. 446**

- - - s. 93, sub-s. 1 : OTTAWA ROMAN CATHOLIC SEPARATE SCHOOLS TRUSTEES v. QUEBEC BANK - **J. C. 230**

STATUTES —continued.

1887.

50 & 51 Vict. c. 58 (Coal Mines Regulation), s. 12, sub-s. 1 : COLTNESS IRON CO. v. DOBBIE **H. L. (Sc.) 916**

1894.

57 & 58 Vict. c. 60 (Merchant Shipping), s. 503 : WORKMEN'S COMPENSATION BOARD v. CANADIAN PACIFIC RY. CO. - - - **J. C. 184**

ss. 503, 504 : CANADIAN PACIFIC RY. CO. v. S.S. STORSTAD - **J. C. 397**

1906.

6 Edw. 7, c. 58 (Workmen's Compensation), s. 1, sub-s. 1 : ARMSTRONG, WHITWORTH & Co. v. REDFORD - **H. L. (E.) 757**

- - - s. 1, sub-ss. 1, 2 (c) : BOURTON v. BEAUCHAMP - **H. L. (E.) 1001**

- - - s. 1, sub-ss. 1, 2 (a), 3 ; s. 2, sub-s. 1, proviso (b) ; Sched. I., par. 1 (b) : KING v. PORT OF LONDON AUTHORITY - - **H. L. () 1**

- - - s. 13 : MANTON (PAUPER) v. CANTWELL - - **H. L. (Ir.) 781**

- - - Sched. I., para. 16 : M'ALINDEN v. NIMMO (JAMES) & Co. - **H. L. (Sc.) 39**

8 Edw. 7, c. 68 (Port of London), s. 21 : PORT OF LONDON AUTHORITY v. ORSETT UNION ASSESSMENT COMMITTEE - - **H. L. (E.) 273**

1909.

9 Edw. 7, c. 9 (South Africa), s. 85 (vi.) : MARSHALL'S TOWNSHIP SYNDICATE, LD. v. JOHANNESBURG CONSOLIDATED INVESTMENT CO. **J. C. 420**

1910.

10 Edw. 7, c. 8 (Finance (1909-10)), s. 58, sub-ss. 1 and 4 : HAMILTON v. LORD ADVOCATE - - **H. L. (Sc.) 50**

1911.

1 & 2 Geo. 5, c. 50 (Coal Mines), ss. 61, 86 ; BOURTON v. BEAUCHAMP - **H. L. (E.) 1001**

1914.

5 Geo. 5, c. 8 (Defence of the Realm), s. 1, sub-ss. 1 and 2, and Regulations thereunder : ATT-GEN. v. DE KEYSER'S ROYAL HOTEL, LD. - **H. L. (E.) 508**

1915.

5 & 6 Geo. 5, c. 89 (Finance (No. 2)), s. 43, sub-ss. 1, 2 : NORTHUMBERLAND (DUKE OF) v. INLAND REV. COMMS. - **H. L. (E.) 825**

STATUTES—continued.

II. COLONIES — AUSTRALIA (COMMON-WEALTH).

1909.

No. 27 of 1909 (Bills of Exchange), s. 88,
sub-s. 1: TAXATION COMMISSIONERS *v.*
ENGLISH, SCOTTISH AND AUSTRALIAN
BANK, LD. - - - J. C. 683

(NEW SOUTH WALES).

1908.

N. S. W., No. 27 (Sydney Corporation),
s. 11, sub-s. 2: MICK SIMMONS,
LD. *v.* ROFE - - - J. C. 379

(QUEENSLAND).

1867.

31 Vict., No. 38 (Constitution), ss. 2, 15:
McCAWLEY *v.* REX - - J. C. 691

1913.

c. 4 (Sugar Cultivation), s. 4: ADDAR
KHAN *v.* MULLINS - - J. C. 391

1916.

7 Geo. 5, No. 16 (Industrial Arbitration),
s. 6, sub-s. 6: McCAWLEY *v.* REX
J. C. 691

CANADA.

1906.

R. S. Can., c. 37 (Railway), ss. 46, 59,
237, 238: TORONTO RY. CO. *v.*
TORONTO CITY CORPORATION
J. C. 426

R. S. Can., c. 113 (Canada Shipping), s. 215:
WORKMEN'S COMPENSATION BOARD
v. CANADIAN PACIFIC RY. CO.
J. C. 184

1906.

— ss. 411, 413: PAQUET *v.* PILOTS'
CORPORATION (QUEBEC) - J. C. 1029

1909.

8 & 9 Edw. 7, c. 32 (Railway), s. 5:
TORONTO RY. CO. *v.* TORONTO
CITY CORPORATION - J. C. 426

1914.

4 & 5 Geo. 5, c. 48 (Pilots), ss. 1, 2:
PAQUET *v.* PILOTS' CORPORATION
(QUEBEC) - - - J. C. 1029

BRITISH COLUMBIA.

1911.

R. S. B. C., c. 127 (Land Registry), ss. 14,
71: ESQUIMALT AND NANAIMO RY.
CO. *v.* GRANBY CONSOLIDATED MIN-
ING, SMELTING AND POWER CO.
J. C. 172

— s. 22: CREELMAN *v.* HUDSON BAY
INSURANCE CO. - - - J. C. 194

R. S. B. C., c. 165 (Placer-mining), s. 5:
QUESNEL FORKS GOLD MINING CO.
v. WARD - - - J. C. 222

STATUTES—continued.

1911.

R. S. B. C., c. 194 (Railway), ss. 17, 18, 27:
ARMSTRONG CITY CORPORATION *v.*
CANADIAN NORTHERN PACIFIC RY.
CO. - - - J. C. 216

1916.

R. S. B. C., c. 77 (Workmen's Compensa-
tion), Pt. I., s. 8 (b): WORKMEN'S
COMPENSATION BOARD *v.* CANADIAN
PACIFIC RY. CO. - - J. C. 184

CANADA (ONTARIO).

1914.

R. S. Ont., c. 75 (Limitations), ss. 5, 47:
TAYLOR (ISABELLA) *v.* DAVIES
J. C. 636

R. S. Ont., c. 185 (Ontario Railway), s.
260: TORONTO RY. CO. *v.* TORONTO
CITY CORPORATION - J. C. 446

— s. 260a: TORONTO RY. CO. *v.*
TORONTO CITY CORPORATION
J. C. 455

R. S. Ont., c. 192 (Municipal Act), s. 249:
MACKAY (JOHN) & CO. *v.* TORONTO
CITY CORPORATION - J. C. 208

1917.

7 Geo. 5, c. 60 (Roman Catholic Separate
Schools): OTTAWA ROMAN CATHO-
LIC SEPARATE SCHOOLS TRUSTEES
v. QUEBEC BANK - - J. C. 230

QUEBEC.

Civil Code of Quebec, art. 980: AUGER *v.*
BEAUDRY - - - J. C. 1010

— art. 1054: QUEBEC RY., LIGHT,
HEAT AND POWER CO. *v.* VANDRY
J. C. 662

1909.

R. S. Queb., art. 7325: MONTREAL TRAM-
WAYS CO. *v.* SAVIGNAC
J. C. [1920] A. C. 408

— art. 7599: MONTREAL CITY *v.* DU-
FRESNE - - - J. C. 1017

HONG KONG.

1917.

No. 25 of 1917 (Deportation Ordinance),
s. 4, sub-s. 14: LI HONG MI *v.*
ATT.-GEN. FOR HONG KONG
J. C. 735

NEW ZEALAND.

1895.

No. 8 of 1895 (Adoption of Children), s. 7:
ARANI (HINEITI RIRERIRE) *v.* PUBLIC
TRUSTEE OF NEW ZEALAND J. C. 198

1901.

No. 65 of 1901 (Native Land Claims Ad-
justment and Laws), s. 50: ARANI
(HINEITI RIRERIRE) *v.* PUBLIC
TRUSTEE OF NEW ZEALAND
J. C. 198

STATUTES—continued.

1908.

- No. 39 (Deaths by Accident Compensation), ss. 3, 5: *UNION STEAMSHIP CO. OF NEW ZEALAND v. ROBIN* - **J. C. 654**

- No. 248 (Workers' Compensation), s. 62: *UNION STEAMSHIP CO. OF NEW ZEALAND v. ROBIN* - **J. C. 654**

1911.

- No. 34 (Workers' Compensation), s. 13: *UNION STEAMSHIP CO. OF NEW ZEALAND v. ROBIN* - **J. C. 654**

- STATUTES OF DISTRIBUTION** - - - 794
See WILL.

- STATUTORY AUTHORITY—Rating** - 273
See RATES.

- STATUTORY POWERS** - - - 662
See CANADA (QUEBEC).

- STATUTORY REGULATIONS** — Disobedience to - - - 1001
See WORKMEN'S COMPENSATION.

- STOWAWAY—Enemy—Neutral ship** - 718
See PRIZE COURT.

- STEAMSHIP—Discharge** - - - 239
See SHIPPING.

- STRAITS SETTLEMENTS (PENANG)—Marriage Law—Chinese Resident—Secondary Wife—Absence of Ceremony.** *CHEANG THYE PHIN v. TAN AH LOY* - - - **J. C. 369**

- SUCCESSION—Right of—New Zealand—Adoption—Maori adoption of European children** - - - 198
See NEW ZEALAND.

- SUCCESSION DUTY** - - - 50
See REVENUE.

- TAXATION (COSTS)—Pauper** - - - 39
See WORKMEN'S COMPENSATION.

- TAXATION (REVENUE)—Exemption from** - - - 216
See CANADA.

- TENANT'S PROFITS—Rating** - - - 273
See RATES.

- TERRITORIAL WATERS—Neutral—Enemy ship—Capture** - - - 1034
See PRIZE COURT.

- TIME—Claim—Workmen's compensation** 1
See WORKMEN'S COMPENSATION.

- TITLE—Grantor without—Title acquired after grant** - - - 392
See CEYLON.

- Registration of - - - 172, 194
See CANADA.

- TRADE OR BUSINESS** — Employer's—Employment for purposes of - - - 781
See WORKMEN'S COMPENSATION.

- TRADE PUBLICATION—Libel** - - - 66
See DEFAMATION.

- TRANSIT—Partly by land and partly by sea** - - - 84
See CARRIER.

- TRANSVAAL.**
See SOUTH AFRICA.

- TRINIDAD—Appeal from** - - - 888
See CONTRACT.

- TRUSTEE—Bankruptcy—Action by** - 102
See BANKRUPTCY.

- Limitations, Statutes of - - - 636
See LIMITATIONS, STATUTES OF.

- Solicitor - - - 581
See DISCOVERY.

- TRUSTS—Will** - - - 860
See ELECTION.

- ULTRA VIRES—Burgh accounts—Common good—Misapplication** - - - 836
See LOCAL GOVERNMENT.

- Land—Holding—Statute - - - 194
See CANADA (BRITISH COLUMBIA).

- UNDUE INFLUENCE—Will** - - - 348
See WILL.

- UNNEUTRAL SERVICE—Neutral ship** 718
See PRIZE COURT.

- VALUE AND NATURE—Goods—Not declared** - - - 84
See CARRIER.

- VERDICT—Jury—Weight of majority verdict.**
See JUDICIAL COMMITTEE.

- VOIDABLE—Not void—Mining lease** - 222
See BRITISH COLUMBIA.

- WAGES—Coal mines** - - - 916
See MINES.

- WAR—Exigencies of the public service** 508
See CROWN.

- WEEKLY PAYMENT—Workmen's compensation—Review** - - - 39
See WORKMEN'S COMPENSATION.

- WIFE—Will—Husband instrumental in preparing** - - - 349
See WILL.

- WILL—Class—Gift to such Persons as on Failure of preceding Trust "shall be my next of kin and entitled to my personal estate under the Statutes of Distribution"—Period of ascertaining Class.**

- Decision of the Court of Appeal [1919] 2 Ch. 17 reversed. *HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN* - - - **H. L. (E.) 794**

- Quebec - - - 1010
See CANADA (QUEBEC).

WILL—continued.

— Trusts - - - - - 860
 See ELECTION.

— Undue Influence — Husband instrumental in preparing Wife's Will—Husband sole Beneficiary—Onus of Proof.

Judgment of the Supreme Court of Canada reversed. *CRAIG v. LAMOUREUX*

J. C. 349

WORDS:—

— "Armed ship": *H.M. SUBMARINE E 14* - - - - - **J. C. 403**

— "Contract to be performed within the jurisdiction": *JOHNSON v. TAYLOR BROS. & Co.* - **H. L. (E.) 144**

— "Consignee of the goods": *THE URNA* - - - - - **J. C. 899**

— "Customer": *TAXATION COMMES. v. ENGLISH, SCOTTISH AND AUSTRALIAN BANK, LD.* - - - **J. C. 683**

— "Employee": *ADDAR KHAN v. MUL-LINS* - - - - - **J. C. 391**

— "Enemy origin": *THE NOORDAM (No. 2)* - - - - - **J. C. 904**

— "Enemy property": *THE NOORDAM (No. 2)* - - - - - **J. C. 904**

— "Final port": *MARTEN v. VESTEY BROTHERS, LD.* - **H. L. (E.) 307**

— "Goods": *THE NOORDAM (No. 2)* - - - - - **J. C. 904**

— "Postal correspondence": *THE NOORDAM (No. 2)* - - - - - **J. C. 904**

— "Predecessor": *HAMILTON v. LORD ADVOCATE* - - - **H. L. (Sc.) 50**

— "Sale" (draft): *THE ORTERIC* - - - - - **J. C. 724**

— "Shall be my next of kin and entitled to my personal estate under the Statutes of Distribution": *HUTCHINSON v. NATIONAL REFUGES FOR HOMELESS AND DESTITUTE CHILDREN* - - - - - **H. L. (E.) 794**

— "Succession": *HAMILTON v. LORD ADVOCATE* - - - **H. L. (Sc.) 50**

— "Workman": *MANTON v. CANTWELL* - **H. L. (Ir.) [1920] A. C. 781**

WORKMEN'S COMPENSATION — Accident arising out of and in the course of Employment — Dinner Hour—Injury on returning to Work from provided Canteen—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.

Decision of the Court of Appeal [1919] W. N. 153 affirmed. *ARMSTRONG (SIR W. G.), WHITWORTH & Co. v. REDFORD*

H. L. (E.) 757

2. — Accident arising out of and in the course of Employment—Disobedience to Statutory Regulations — Sphere of Employment—Added Peril—Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), ss. 61, 86—Explosives in Coal Mines Order, September, 1913, Pt. I., paras. 2 (c), 3 (c)—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-ss. 1, 2 (c).

Decision of the Court of Appeal affirmed. *BOURTON v. BEAUCHAMP* - **H. L. (E.) 1001**

— British Columbia - - - - - 184
 See CANADA.

3. — Latent Injury — No present Incapacity—Probability of future Incapacity — Jurisdiction of Arbitrator to make Award — Form of Order—Time for making Claim for Compensation—Failure to make Claim within specified Period—Reasonable Cause — Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-ss. 1, 2 (a), 3; s. 2, sub-s. 1, proviso (b); Sched. I., para. 1 (b). *KING v. PORT OF LONDON AUTHORITY* - **H. L. (E.) 1**

— New Zealand - - - - - 654
 See NEW ZEALAND.

4. — Review of Weekly Payment—Partial Incapacity—No Change in physical Condition—Inability to get Work—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., para. 16—Costs—Taxation—Pauper — Appeal to House of Lords—Scottish Appeal — Successful Pauper Appellant. *M'ALINDEN v. NIMMO (JAMES) & Co.* - **H. L. (Sc.) 39**

5. — "Workman"—Casual Labourer—Repairing a Farmhouse—Employment for Purposes of Employer's Trade or Business — Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 13.

Decision of the Court of Appeal in Ireland [1918] 2 I. R. 563 reversed. *MANTON v. CANTWELL* - - - - - **H. L. (Ir.) 781**

WRIT—Service out of the jurisdiction - 144
 See SERVICE OUT OF THE JURISDICTION.



THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

The Subscription List for 1920
is now open
and will close on 31st January, 1920.

THE LAW REPORTS, 1920 (Unbound).

ENTIRE SERIES (including Statutes, Weekly Notes, and Complete Current Digest). Prepaid Subscription if paid before 1st February, 1920	£	s.	d.
After 31st January, 1920	4	4	0
COMPLETE CURRENT DIGEST, 1920 (a Digest, issued quarterly, of all reported cases) (unbound)	5	5	0
CONSOLIDATED DIGEST, 1865-1890 (in cloth)	0	15	0
DECENNIAL DIGEST, 1891-1900 (in cloth)	2	10	0
DECENNIAL DIGEST, 1901-1910 (in cloth)	1	5	0
WEEKLY NOTES, 1920 (unbound)	1	5	0
INDIAN APPEALS, 1920—			
Prepaid Subscription if paid before 1st April, 1920 (unbound)	1	1	0
After 31st March, 1920 (unbound)	1	5	0
INDIAN APPEALS, DIGEST, 1874-1893 (in cloth)	0	11	6

The Council undertake the binding of their publications. The Secretary will be pleased to give estimates for bindings in special styles desired by subscribers.

PRICES FOR OFFICE PATTERN BINDINGS.

LAW REPORTS, 1919 (7 Vols.).

	5s. 0d. per Vol.
Cloth	5s. 0d.
Half-Calf	8s. 6d.
Half-Morocco	9s. 6d.
Calf	11s. 6d.

WEEKLY NOTES, 1919 (1 Vol.).

	Notes of Cases	Miscellaneous
Cloth	5s. 6d.	6s. 0d.
Half-Calf	9s. 6d.	10s. 0d.
Half-Morocco	10s. 6d.	11s. 0d.
Calf	13s. 0d.	14s. 0d.

When the Subscriber's address is more than four miles from the Law Courts a charge of 3s. is made for cost of carriage of bound Volumes for the Year.

Until 31st January, 1920, the Council will accept subscriptions for binding the 1920 Volume of the *Law Reports* at the prices above-mentioned for binding the 1919 volumes.

The back years of the *Law Reports*, since 1890, and of the *Indian Appeals*, since 1874, may be obtained on application to the Secretary. The *Weekly Notes* for 1891-1914 are out of print.

All sums payable to the Council must be prepaid, and (unless a Banker's Order has been given) should be remitted direct to the Secretary.

Cheques and Money Orders should be made payable to the Council and crossed " & Co., not negotiable." *Banker's Commission must be added to the amount of the Subscription, in case of every remittance from Ireland, Scotland, the Isle of Man, the Channel Islands and Abroad, unless the remittance is made payable in London.*

COMMUNICATIONS should be addressed to:

THE SECRETARY, COUNCIL OF LAW REPORTING,

30, Montague Street, London, W.C. 1

The English & Empire Digest

WITH COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING A COMPLETE DIGEST OF EVERY ENGLISH CASE
REPORTED FROM EARLY TIMES TO THE PRESENT DAY.

Editorial Board :

Editor-in-Chief : **THE RIGHT HONOURABLE THE EARL OF HALSBURY**, Lord High Chancellor of Great Britain, 1885-86, 1886-92, and 1895-1905 ; a Member of the Judicial Committee of the Privy Council. *Managing Editor* : **SIR WILLES CHITTY**, of the Inner Temple, Barrister-at-Law, a Master of the Supreme Court. *With Associate Editors and Advisory Board*—*Scotland* : **THE HON. LORD SALVESEN**, Senator of the College of Justice, Scotland. *Ireland* : **THE RIGHT HON. CHARLES A. O'CONNOR**, Master of the Rolls in Ireland ; **THE RIGHT HON. SIR D. PLUNKET BARTON, BART.**, lately a Judge of the Chancery Division and formerly a Judge of the King's Bench Division of the High Court of Justice in Ireland ; and **HENRY DANIEL CONNER, ESQ., K.C.**, and eminent Judges and Lawyers for the Dominions Beyond the Seas.

BUTTERWORTH & Co., BELL YARD, TEMPLE BAR, W.C. 2.
(S. S. BOND.)



JUL 3 1 MAR 1978

